

# The Law School Record



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Mr. Peter Fitzpatrick delivering his lecture on Chief Justice Edward Douglass White.

## *Edward Douglass White*

[In April, the Law School sponsored a lecture by Mr. Peter Fitzpatrick, a distinguished member of the Chicago Bar, on Chief Justice Edward Douglass White. Mr. Fitzpatrick's paper follows.]

When Wilson named Brandeis to the Supreme Court seven past presidents of the American Bar Association testified against his confirmation. Ex-president Taft wrote to his wife: "I hope White will not end his judicial career with an apoplectic fit caused by the nomination."<sup>1</sup> At about this time Brandeis conferred with White. Perhaps, because the opposition to Brandeis recalled to White's memory the charge of bribery that once had been leveled against him when he fought the Louisiana Lottery, he immediately accepted Brandeis and insisted that Brandeis should look on him not as the Chief Justice but as a father. Following this meeting, in circulating a draft opinion, Brandeis wrote on the copy to be delivered to White, "Father Chief Justice." In returning the draft opinion, White showed appreciation of the spirit of the ex-

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## *GOVERNOR STRATTON ON LAW DAY*

May 1, 1958, was designated "Law Day—USA" by Presidential and Gubernatorial proclamation. On that date, the Honorable William G. Stratton, Governor of Illinois, delivered a public lecture at the University, as the principal feature of the Law School observance of Law Day. Governor Stratton's address follows.

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Governor Stratton delivering his Law Day Lecture in Breasted Hall.



## *The Hinton Competition*

The final round of the Hinton Moot Court Competition was held last month. The Hinton Competition is a student-administered moot court program, designed to supplement the moot court arguments in which all students participate during the first-year tutorial course. The School awards prizes to the winning team, and the team which represents the Law School in the national moot court competition is selected from among those participating.

This year, the Bench for the final round was composed of the Honorable David L. Bazelon, Judge of the U. S. Court of Appeals for the District of Columbia, the Honorable John S. Hastings, Judge of the Circuit Court of Appeals for the Seventh Circuit, and the Honorable Walter V. Schaefer, JD'28, Justice of the Supreme Court of Illinois.

The case argued was *Commissioner of Internal Revenue v. Doyle*, 231 F.2d 635 (C.A. 7, 1956). Acting as counsel for the Commissioner were C. John Amstutz, of Youngstown, Ohio, A. B. Oberlin College; Robert T. Cornwell, of Oklahoma City, A.B., Central State College; and Robert L. Reinke, of South Bend, A.B., Wabash College. Appearing for the taxpayer were Morton A. Brody, of Auburn, Maine, A.B., Bates College; E. Gene Crain, of Costa Mesa, California, A.B., Pomona College, Francis J. Gerlits, of Chicago, Ph.B., University of Notre Dame; and John G. Satter, Jr., of Sioux City, Iowa, A.B., University of South Dakota. The latter team was awarded the decision.

During the current year, the chairman of the Moot Court Committee, which conducts the Hinton Competition, has been Robert T. Cornwell.



Left to right, The Honorable John Hastings, Judge of the U.S. Court of Appeals for the Seventh Circuit, The Honorable Walter V. Schaefer, JD'28, Justice of the Illinois Supreme Court and The Honorable David Bazelon, Judge of the U.S.

Court of Appeals for the District of Columbia, who comprised the court which heard the final argument of the Hinton Moot Court Competition.





*The final argument in the Hinton Competition begins.*



*Finalists in the Hinton Competition, left to right, the team of: Clarence J. Amstutz, Jr., of Ohio, A.B., Oberlin College; Robert T. Cornwell of Oklahoma, A.B., Central State College; and Robert L. Reinke of Indiana, A.B., Wabash College.*



## *Recognition-Organizational Picketing and Right-to-Work Laws*

By BERNARD D. MELTZER

*Professor of Law,  
The University of Chicago Law School*

*[From a speech delivered to the Labor Committee of the Chicago Association of Commerce and Industry. Reprinted, with permission, from the January, 1958, issue of the Labor Law Journal, published by Commerce Clearing House, Chicago.]*

A recurring problem of policy is the reconciliation of the interests of individuals and those of groups which are favored by the law because they meet, or at least are thought to meet, important social needs. It is this problem which underlies the controversy about the two topics which I have been asked to discuss—(1) recognition and organizational picketing, and (2) the so-called "right-to-work" laws. Accordingly, before turning to these topics, I want briefly to remind you of the general framework for reconciling group and individual interests which has been embodied in our national labor policy.

The Wagner Act, closely following the analogy of political elections, embodied the principle of free choice by the individual employee and the principle of majority rule. It also provided for the establishment of election machinery for determining the employees' uncoerced preferences with respect to representation. The Taft-Hartley Act, without disturbing those provisions, made it plain that the principle of free choice meant that the right to reject a bargaining representative was entitled to the same respect as the right to select one. The Taft-Hartley Act, like the Wagner Act, entitles a union to bargaining rights only if it has the uncoerced support of a majority of the employees in the unit. In a Board-conducted election, a majority of those voting is in general entitled to speak for the entire unit.

The bargaining agent, under the majority rule principle, has broad and exclusive authority in negotiating the terms and conditions of employment. The employer must bargain with the representative and with no one else. The interests of the individual and of smaller groups within a bargaining unit are thus subordinated to, and may be sacrificed to, the interests of the entire group, subject only to the representative's duty of fair representation of all employees.

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*Winners of the Hinton Competition, the team of, left to right, Morton A. Brody of Maine, A. B. Bates College; Francis J. Gerlits of Chicago, Ph.B., University of Notre Dame; E. G. Crain of California, A.B., Pomona College; and John G. Satter, Jr., of Iowa, A.B., University of South Dakota.*



## *The Class of 1938*

by RICHARD JAMES STEVENS, JD '38

It looks like the Class of 1938 has grown into a group of good, solid, tax-paying, child-rearing, mortgage-plastered citizens. Of course this conclusion is based on the incomplete evidence of thirty-eight questionnaires returned. Perhaps some of our experts in the analysis of statistical evidence, such as Harry Kalven, Jr., who has been working night and day, through courtesy of the Ford Foundation, on a massive study of the functioning of the jury system, or Paul Schwiebert, Director and Actuary for United Insurance Company, can point out the glaring fallacies in this conclusion. As of now, however, on the evidence at hand, that's about the way it looks.

Take this matter of offspring, for example. The thirty-eight who were foolhardy enough to answer the questionnaire, admitted to a total of eighty-seven children and two grandchildren—an average of 2.34 descendants each. Frank Mahin is the only proud grandfather in the class, boasting of two grandchildren—one girl and one boy. Three of us are neck and neck in the children derby, with five each—Thomas Megan, Conway Ashton and Richard James Stevens. Lee Shaw, Melvin Cohen and John Lynch are right on their heels with four youngsters each. Nine are in the "show" position, with three each—Bob Macdonald, Frank Mahin, William Pettigrew, Homer Rosenberg, Donald A. Morgan, Arthur B. Sachs, John Canright, Harry Kalvin, Jr., and Lydia Levinson Rashman.

Apparently, we like the practice of law. Twenty of us are active in the practice and almost all of the twenty are either partners or have their own individual practice. Sixteen of the twenty are in firms. Robert Macdonald (Seyfarth, Shaw, Fairweather & Geraldson of Chicago); Henry Hill (Mayer, Friedlich, Spiess, Tierney, Brown & Platt of Chicago); Richard F. Mullins (Arn & Mullins of Wichita); Melvin Cohen (Leonard M. & Melvin Cohen of Chicago); Lee C. Shaw (Seyfarth, Shaw, Fairweather & Geraldson of Chicago); Harry Schulman (Perlman, Rubin & Schulman of Chicago); Donald A. Morgan (Davis, Morgan & Witherell of Peoria); Willis E. Parkinson (Parkinson & Stewart of Glenwood Springs, Colorado); Zalmon Goldsmith (Petersen & Goldsmith of Aurora); Sheldon E. Bernstein (Newmyer & Bress of Washington); Irwin J. Askow (Askow and Stevens of Chicago); Maurice Rosenfield (Friedman, Zoline & Rosenfield of Chicago); John R. Lynch (Robertson & Lynch of Lafayette); Marcus Cohn (Cohn & Marx of Washington); Robert A. Crane (Hubachek & Kelly of Chicago); Richard James Stevens (Askow and Stevens of Chicago).

Four of us have our own firms: Franz M. Joseph (New York); Homer E. Rosenberg (Chicago); Arthur B. Sachs (Chicago); John R. Canright (Lanikai, Oahu, Territory of Hawaii).

Six of us are prominent in the insurance field: Frank M. Mahin is Branch Claim Manager for Lumbermen's Mutual Casualty Company in Louisville; Conway A. Ashton is office attorney for Beneficial Life Insurance Company, Salt Lake City; Stanford Miller is Vice President of Employers Reinsurance Corporation in Kansas City, Missouri; Walter F. Bernal is Claims Manager for Allstate Insurance Company, Atlanta Branch; Paul W. Schwiebert is Director, Vice President and Actuary for United Insurance Company of America; John F. Shallenberger is Manager of Capitol Life Insurance Company in Denver, Colorado.

Six of us have positions with corporations: Thomas I. Megan is General Attorney for the Chicago, Rock Island and Pacific Railroad Company in Chicago; Warren R. Kahn is Vice President of Harry Alter Company in New York; Roger A. Baird is General Attorney and Assistant Secretary for Kimberly-Clark Corporation in Neenah, Wisconsin; Myron L. Duhl is Assistant Secretary of Ekco Products Company in Chicago; William S. Pettigrew is Patent Attorney for General Motors Corporation in Detroit; Robert E. Haythorne is counsel for American Marietta Company in Chicago.

Only two of us teach law full time: Quintin Johnstone is Associate Professor of Law at Yale Law School; Harry Kalven, Jr., is Professor of Law at the University of Chicago, in addition to being Director of the Law School Jury Project. Several of us have dabbled in teaching on occasion: Henry L. Hill has lectured on Aviation Law, his specialty, at Northwestern University; Franz Joseph has been Professor of Law at Institut de Droit Compare; Irwin J. Askow has taught Business Law at Northwestern University; Maurice Rosenfield has lectured at the University of Chicago Law School.

Only three of us presently are active in government work, but their activity has been enough to make up for the rest of us. Marie Cole Berger has been Assistant Solicitor with the Department of Agriculture; Senior Attorney for the OPA; active in the office of Foreign Relief and Rehabilitation of the State Department; Acting Chief of the Distribution Section of UNRRA; attached to the Headquarters of the UNRRA Balkan Mission at Cairo, Egypt; in December of 1944 she was wounded by tank fire in Athens. She served as Foreign Affairs Officer in the Office of Dependent Area Affairs and later was appointed Attorney for the Point Four Program in the Near East and Africa Region, finally serving as Chief of the



## ALUMNI NOTES

We note with great pleasure the continually increasing number of alumni who have become members of the judiciary. AXEL J. BECK, JD'22, of Elk Point, South Dakota, has been appointed United States District Judge. Judge Beck, who has practiced law in South Dakota since his graduation, has been Republican National Committeeman from that state for the past ten years. E. HAROLD HALLOWS, JD'30, has been appointed a Justice of the Supreme Court of Wisconsin. Justice Hallows, formerly a member of the firm of Hoffman, Hallows and Cannon, is a past president of the Wisconsin Bar Association. He is a member of the House of Delegates of the American Bar Association, and has for many years taught in the law school of Marquette University.

ARTHUR J. MURPHY, JD'22, recently became a member of the Illinois Appellate Court. After many years of private practice in Chicago, Judge Murphy served as a Judge of the Superior Court of Cook County. Probably the youngest judge among the

School's alumni is L. HOWARD BENNETT, JD'50. After practicing in Minneapolis since his graduation, Judge Bennett recently became a member of the Municipal Court of that city. Doubtless the most colorful judicial office held by an alumnus is that now filled by PHILIP R. TOOMIN, JD'26. After an extensive period of private practice in Chicago, he was recently appointed a Justice of the High Court of the Trust Territory of the Pacific Islands. His Court currently sits in Truk, in the Carolines.

At the annual meeting of the Women's Bar Association of Chicago, Professor BERNARD MELTZER, JD'37, acted as Chairman of a panel discussion of "Recognition Picketing." Among other participants in the panel were LEE SHAW, JD'38 and ABNER J. MIKVA, JD'51.

DONALD L. HESSON, LLM'42, writes that he is now a member of the English Bar, and in practice as a Barrister in London, where he occasionally sees ALBERT H. ROBBINS, JD'23, who has been in practice in both England and the United States.



The Fifth Annual Alumni Fund Campaign is now under way. Shown above are, left to right, J. Gordon Henry, '41, Co-Chairman; Dwight P. Green, '12, Honorary Chairman; and Bernard Nath, '21, Chairman.

## Class of 1938

East Africa Region. In 1954 Marie was granted the Rockefeller Public Service Award for outstanding public service. Under this award she spent approximately one year in Samoa and other Pacific islands. Presently she is back in Washington on the staff of the Regional Director for the Near East and South Asia of the International Cooperation Administration as Operations Officer. Quite a colorful career!

Karl E. Lachmann also has had an interesting government career. He was Assistant Solicitor to the Department of Interior; Special Attorney at the Office of Price Administration; Chief of International Tax Section, Fiscal and Financial Branch, Bureau of Economic Affairs, United Nations; was in the private

Dean Levi at a recent luncheon meeting of New York. The meeting was arranged by George B. Pidot, '30.



practice of law in Arlington from 1940 to 1943; was Prosecuting Counsel at the Nuremberg trials; Deputy Executive Secretary of the United Nations Conference on the Declaration of Death of Missing Persons, Lake Success, in 1950; was Secretary, Technical Assistance Conference on Comparative Fiscal Administration in Geneva, 1951; and presently is Chief of International Tax Section Fiscal and Financial Branch, Bureau of Economic Affairs, United Nations Secretariat. He is a member of the American Economic Association; American Society of International Law; National Tax Association; Society for Comparative Legislation and International Law, England; Societe

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## *The Jury, The Law, and The Personal Injury Damage Award*

by HARRY KALVEN, JR.

Professor of Law,

The University of Chicago Law School

Director of the Jury Project

(Reprinted with permission from 19 Ohio State  
Law Journal 158)

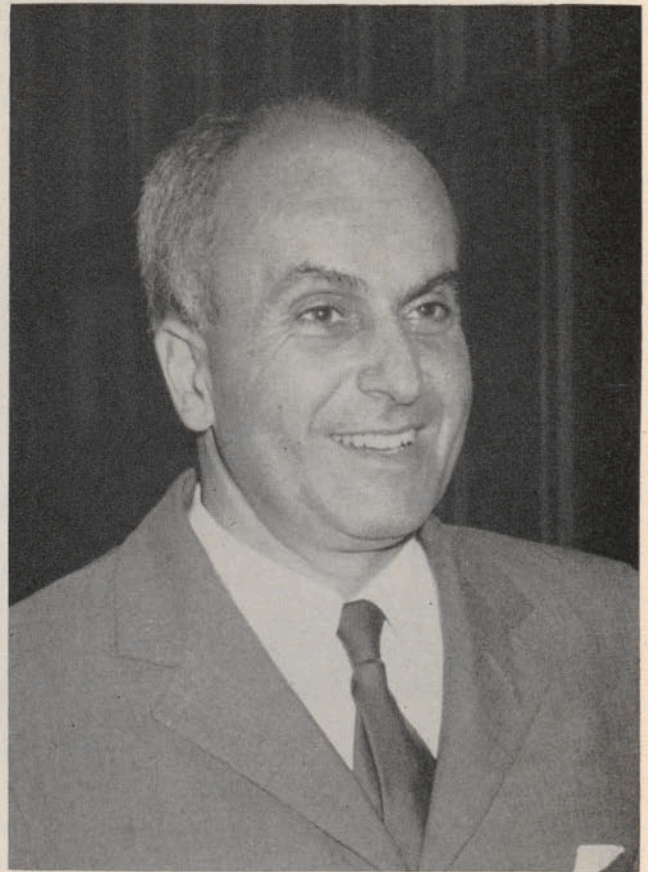
A few years ago Professor Jaffe in one of his customarily wise and urbane articles<sup>1</sup> observed: "I suggest that the crucial controversy in personal injury torts today is not in the area of liability but of damages." I think he is right on several counts. First the criticism of personal injury awards it at least as much concerned today with their level as with their frequency. Second it is my impression that on the bar's view the difference between lawyers—at least plaintiff lawyers—is measured more in terms of what they would get in a given case than it is in terms of winning or losing. Again, as a matter of simple arithmetic there is of course a greater difference between a \$30,000 and a \$10,000 verdict than there is between a \$10,000 one and a verdict for the defendant. And finally to pick up the point Professor Jaffe was most concerned with—it is selecting the appropriate award level that is the most troublesome issue in proposals to shift areas of tort to strict liability compensation schemes.<sup>2</sup>

Professor Jaffe went on in the passage quoted to wonder why damages received so little attention in law school study and in the secondary literature on tort.<sup>3</sup> "Questions of liability," he continued, "have great doctrinal fascination. Questions of damage—and particularly their magnitude—do not lend themselves so easily to discourse. Professors dismiss them airy as matters of trial administration. Judges consign them uneasily to juries with a minimum of guidance, occasionally observing loosely that there are no rules for assessing damages in personal injury cases. There is analogy for this situation in Jerome Frank's complaint that fact finding, though of paramount importance, is neglected by teachers who devote themselves too exclusively to appellate law. This may reflect not so much their judgment of relative importance (as Judge Frank supposes) as the relative adaptability of the subjects to conceptualization. And so it probably is with the subject of damages."

Once again I think he is right. And I would add only this—the reason the law of damages escapes ready conceptualization is because it is so pre-eminently jury law. Damages even more than negligence itself is law written by the jury. I would suggest therefore that it

is the absence of data as to jury behavior on damage issues which places an important topic generally beyond our reach.

The purpose of this comment is not to supply the necessary data. The Jury Project at the University of Chicago Law School has for several years now been studying the jury empirically.<sup>4</sup> It has progressed far enough to reaffirm that the jury's handling of damages is an extraordinarily interesting topic. It has also progressed far enough to realize that it would take a full life time of empirical research to document the many nuances in this corner of jury law. In any event the



Hans Zeisel

project will within the next year or so begin to publish the results of its inquiries and I shall not attempt to report them in any substantial way here. I should like therefore to essay no more than a few reflections on the topic, in part engendered by my over-all experience with the project materials and in part by my experience in teaching torts. And in so doing I shall frequently step well beyond the project data and indulge in speculation.

This comment then will consider four closely related points: first the degree of freedom we accord the jury on damage issues; second, the light that is thrown on the existing law of damages when, so to speak, it is



held up against the mirror of jury equity; third, the role of damages both as an index of the propensity of jurors with different backgrounds and experience to see the same matter in different ways, and also its role as a kind of solvent that makes jury consensus possible in the deliberation process itself; and finally I should like to touch briefly on the differences between judge and jury in deciding damages questions.

# I

The freedom and discretion of the jury on issues of damage is in many ways like that of the jury on any issue. It derives first of all from the institutional arrangements under which the jury is permitted to deliberate in private and to report its decision out by general verdict.

Further the cardinal premise of common law personal injury damages is that they be not limited by schedule but be computed *de novo* for each individual case. There is in brief no standard man, no reasonable man afoot in the law of damages.<sup>5</sup> Joined with this premise is the companion notion that it is the function of tort damages to make the plaintiff whole: he is not, that is, to bear any part of his accident loss himself, if there was a legally wrongful accident.<sup>6</sup> It is this premise in particular which Professor Jaffe bravely challenges, but so long as the system accepts these two premises there cannot be many specific rules of damages. And the jury is of necessity left free to price the harm on a case by case basis.

The court's opportunities for control of the jury on damages are therefore severely limited. Its basic device is the general damage instruction itself which can do no more than convey to the jury the large headings under which it may award damages. Since these are so broad the chief message of the instructions to the jury is to tell them how free they are.<sup>7</sup> Beyond this the court can only rarely control by excluding evidence or by withdrawing an item of damage from the jury. And finally there is its power to set aside excessive or inadequate awards. The practical trick of using *additur* and *remittitur* has given some possibility of control here, but it is today the recognized practice to use that power sparingly indeed.<sup>8</sup>

Perhaps this has been said too quickly. It is true that to price a punch in the nose or a broken leg is at first blush a difficult value judgment. But the law appears to avoid the impossible here by breaking the loss components down into subordinate questions of fact as to medical expense, economic loss, and pain and suffering. Medical expense and economic loss do have some objective reality but the warrant to add pain and suffering gives the jury immediate freedom to price the injury subjectively. And where, as is so often the case, there is an issue not only of accrued loss but of loss in the future the facts as to medical expense and economic loss become enormously more

ambiguous. And again it is only with the wage earner that economic loss is reasonably clear. As soon as the claimant is a proprietor, a housewife<sup>9</sup> or a child it is apparent that the jury's task is substantially less limited by objective data. The upshot therefore is that the ambiguities of damages as fact issues add several degrees of freedom to the jury.<sup>10</sup>

If one is tempted to read reasons into institutional arrangements, as I confess I am, one suspects that the law recognizes that the computing of damages involves a complex value judgment as well as a literal determination of fact. And that with damages as with negligence itself the law intends the jury to legislate interstitially, to fill out the vague general formula. On this view the jury's freedom and discretion is not by default but by preference—preference for the community sense of values as the standard by which to price the personal injury. And on this view the jury's role in setting personal injury damages is not so different from its role in setting general damages in defamation.

Could the jury's freedom and autonomy over damages be reduced without a drastic change in the system? Let us take a second look at the usual damage instruction. Today it tends to be a long complex sentence or two. My impression is that it could be more effectively communicated so that the jury became more conscious of its assignment to compute damages by first ascertaining a series of component sums. But I am not at all certain just what effect this would have on the jury, if any. It is a major characteristic of the jury's approach to damages that it does not much concern itself with the damage components as an accountant might but searches rather for a single sum that is felt to be appropriate. Whether any instruction could turn the jury away from its gestalt approach to a more explicit concern with adding component sums I do not know. But I do have a fairly firm impression from our project materials that the result would be in general to increase damages rather than to deflate them. If one seriously assesses the components in a case of any magnitude they are likely to add up to a surprisingly large figure. I take it this is one reason why the plaintiff bar sometimes expresses a preference for the accountant type juror in a case where damages are substantial and well documented. And I would suspect also that this is one secret of the success of Mr. Belli and his colleagues—their rhetoric at the blackboard is directed to stimulating the jury to compute. Not simply sentiment but arithmetic seems to be on their side under the existing rules.

Other considerations come to mind.<sup>11</sup> It is possible that use of special verdict procedures on damages would force the jury to be more explicit in weighing the component items.<sup>12</sup> It is my impression that the



special verdict is much less frequently used on damages however than on liability. And it is not unlikely that the jury could easily escape the special verdict control and tailor its specific damage answers after the fact so as to make them accord with the "felt" appropriate overall sum.<sup>13</sup> Similarly one wonders whether radical changes in trial procedure whereby for example the jury would not be instructed on the damage issue until they had completed their decision on liability would make a difference.<sup>14</sup> One matter that has impressed us is the sheer time gap between the time the jury hears the damage instruction and the first time they are ready to turn seriously to it in the deliberation.<sup>15</sup>

Consideration of the damage instruction suggests one other interesting point that has in recent years broken through on the appellate level. To what degree do the instructions fail to control because they remain silent? This has two aspects. First should the court like a good teacher not only tell the jury what it is to do but also anticipate certain probable misunderstandings and negate them in advance? In two wrongful death cases we have been able to study by post trial interview it is apparent how readily such misunderstandings can arise. In the one case the jury simply does not understand that it is not being asked to place a value as such on human life; therefore the point arises with some intensity in the deliberation that any human life must be worth at least \$5,000. In the other case where damages for loss of support were clearly substantial the jury somehow gets the notion that damages are a sort of welfare payment based on minimum subsistence notions rather than the direct measure of loss of support.<sup>16</sup> The propriety and wisdom of the court anticipating such misunderstandings is of course a controversial matter. I would favor it here since the general instruction standing alone seems to expose the jury to needless misconceptions and nothing more.

The second aspect of the "silent" instruction is more familiar. Several important and clear damage rules are normally kept from the jury altogether. Thus they are not told that his lawyer's fees are not part of plaintiff's damage; they are not told that interest is not to be awarded from the time of injury; they are not told that the award is not subject to federal income taxation.<sup>17</sup> The law on these points is perfectly clear—in fact it is ironically the only clear part of damage law. The non-disclosure of the law to the jury raises an obvious policy dilemma. Undoubtedly in part the non-disclosure stems from a suspicion that the instruction will only sensitize the jury and stimulate them to do something they otherwise might not do—a suspicion that our study suggests is well founded.<sup>18</sup> And in part it stems, I suppose, from an ambivalence toward the rules themselves. We are not so sure how we feel about

the plaintiff paying his attorney out of his award. And as with contributory negligence we may not mind too much the jury eroding the rule<sup>19</sup> as a crude de facto reform.

Another detail is suggested by a recent English case.<sup>20</sup> Here the judge was trying the issue without a jury and the question arose as to the propriety of his considering as precedent awards in other comparable cases. The trial court thought this improper. The reviewing court thought it might prove helpful to the trial judge if done in moderation, but limited its view to bench trials. The court went on: "It may be asked: 'Why should a judge have something before him which a jury would not have?' I am not sure there is any good reason, except perhaps, that if jurors, new to the task, are called on to assess damages in a case such as this, the more one can keep their minds directed to the actual issues the better." Perhaps it is hard to escape the conclusion of the English court but

*Continued on page 55*

### *From The Silver Collection*

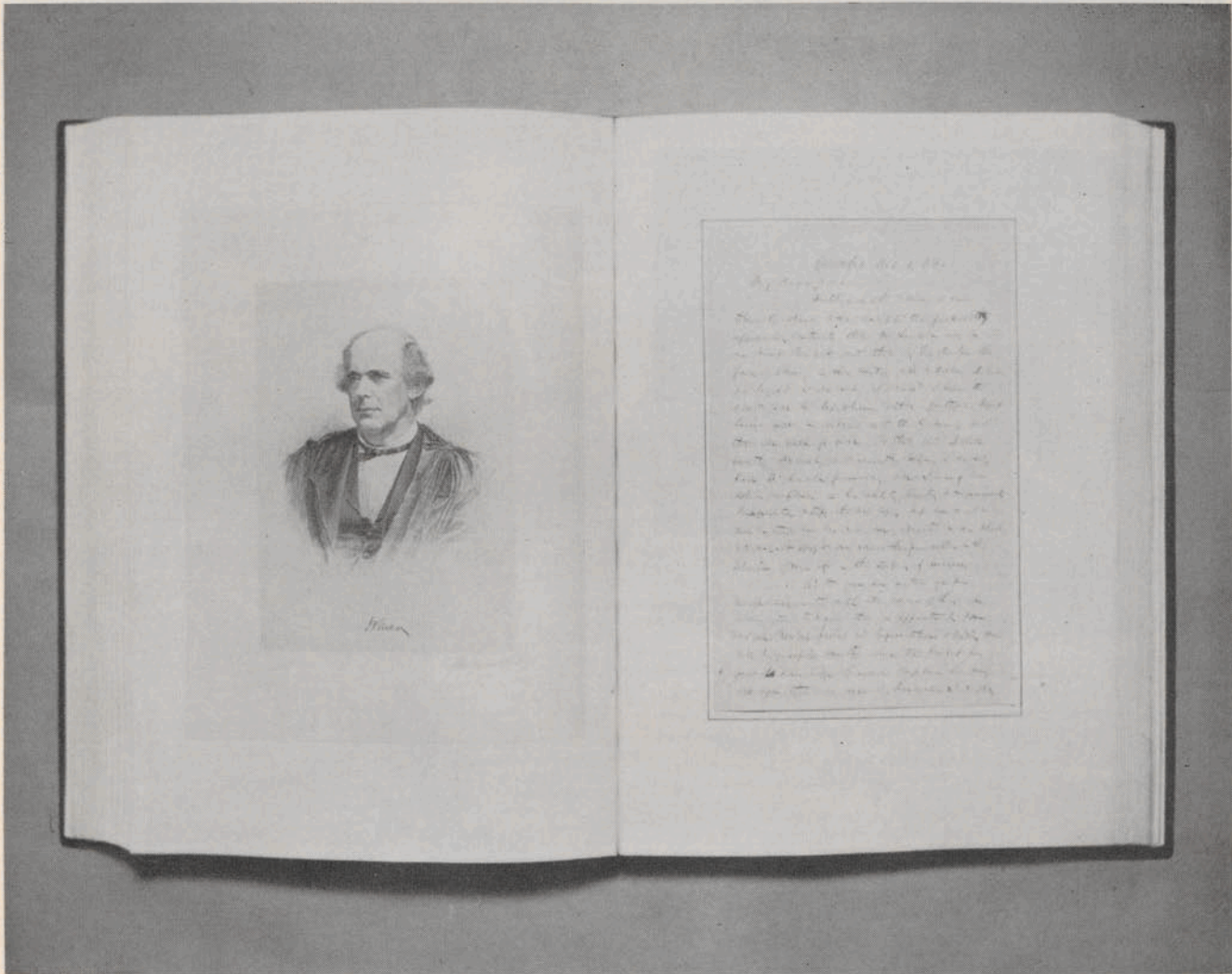
An extensive collection of autographed portraits and letters of Justices of the United States Supreme Court has been presented to the Law School by Louis H. Silver, JD'28. A photograph of a portrait of Chief Justice Salmon P. Chase, with a letter from Chief Justice Chase to a Mr. E. A. Stansbury, is reproduced on this page. The text of that letter, written shortly before the presidential election of 1860, when Chase was Governor of, and a candidate for, Senator from Ohio, is as follows:

My dear friend,

Nothing in the future is even tolerably clear to me except the probability, approaching certainty, that Mr. Lincoln will be our next President, and that by his election the power of slavery in this country will be broken. What lies beyond I see not. I hope the Administration will be Republican, and that faithful Republicans will be called into the Cabinet, and that all will be well. To that end I shall honestly, sincerely and earnestly labor. I do not know Mr. Lincoln personally. All I hear of him inspires confidence in his ability, honesty and magnanimity. These qualities justify the best hopes, but we must remember that he has not been educated in our school, and may not adopt our ideas, therefore, either in the selection of men or in the shaping of measures.

As to your own matter, you are enough acquainted with the course of things in Washington to know that in appointments from New York, New York Senators and Representatives and leading men will be principally consulted. Where the President has personal knowledge and personal confidence he may act upon





Portrait of Chief Justice Salmon P. Chase, with a letter in his handwriting. From the Louis Silver Collection recently pre-

sented to the Law School. Further details elsewhere in this issue.

that, as, were I President, I might in your case; but aside from such knowledge and confidence, decisions must be based chiefly on the recommendations of men nearest the heart of the party. Of course, I pledge to you that I shall always stand ready to promote your interests, when I can do so effectively and without injustice to the claims upon me of citizens of my own state. I know nothing now in the way of my aiding any efforts of your friends in New York regarding the positions you desire; and yet it is too early to say whether circumstances may not arise which will prevent me from being of any valuable service to you.

I have no expectation of occupying any other relation to the Administration than that of Senator; nor do I desire any other.

Your references to your own affairs give me pain. I supposed you had got rid of the pecuniary troubles

you some time complained of. That you have been faithful to the cause, to your convictions, and to Republican principles I know. Were I so situated as to act independently, and had the power to give you a significant proof of my affection, that proof should not be wanting. But I am only a passenger in the boat; I bear no command.

To me, a loyal devotion to the cause has proved a prize of anything but wealth. For ten years I have given my almost undivided attention to this affair, and my private interests have suffered greatly. If I could honorably do so, I would have willingly retired from all public employment, and given myself to the more profitable business of private life, in which I am sure far more enjoyment is to be found than in public.

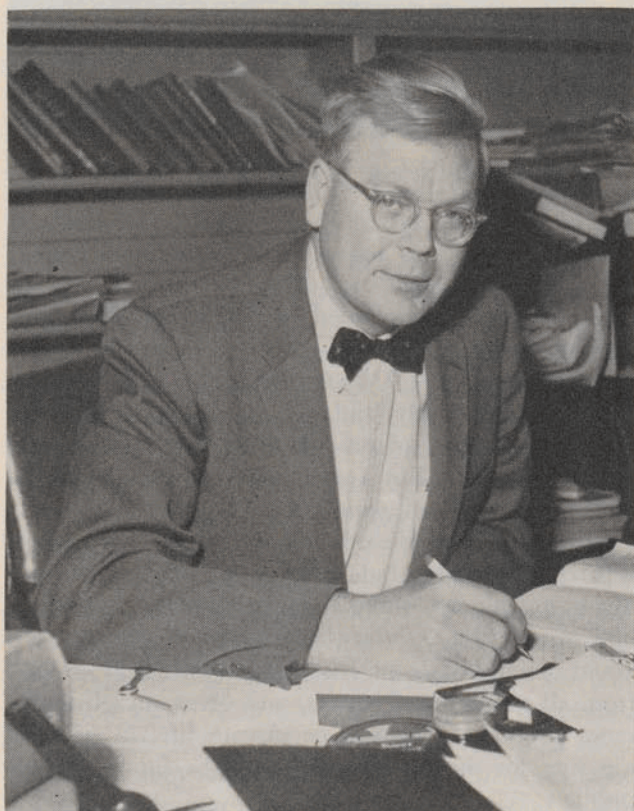
Faithfully your friend,  
S. P. Chase



*Some Alumni of The Law School Now Practicing in New York*



On the left, Edwin L. Weisl, JD'19, of Simpson Thacher and Bartlett. Mr. Weisl is shown with Senator Lyndon Johnson during his service as Special Counsel to the Senate Subcommittee on the Preparedness of the Armed Forces. (New York Times Photo)



Monrad G. Paulsen, JD'42, Professor of Law, Columbia University.



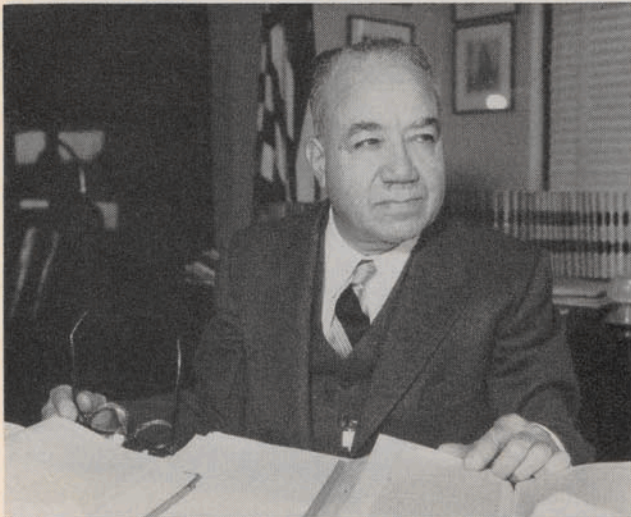
George B. Pidot, JD'30, of Shearman and Sterling and Wright.





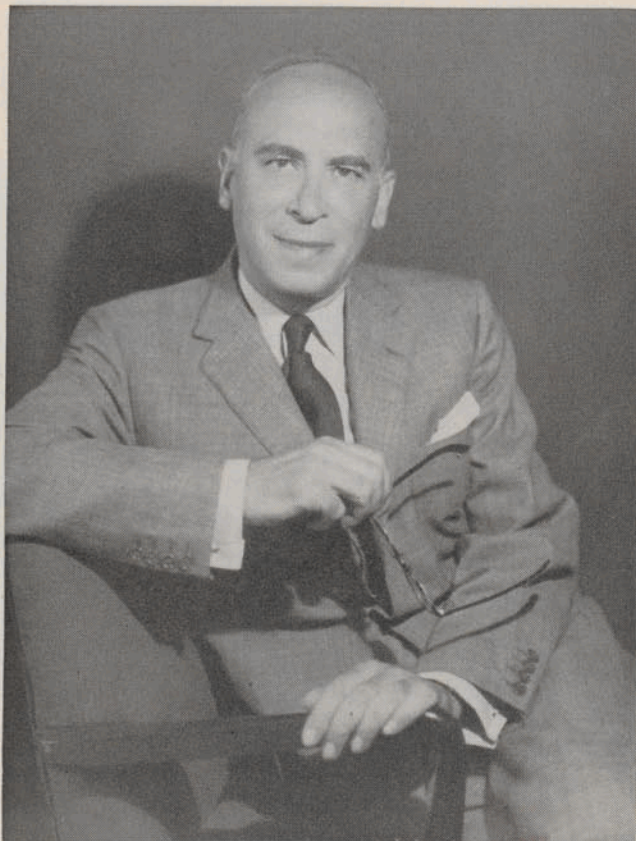
A group of the School's younger alumni in New York. Left to right, seated, Alan C. Swan, JD'57, of Milbank, Tweed, Hope and Hadley; Frederick A. Yonkman, JD'57, of Winthrop, Stimson, Putnam and Roberts; Wilson R. Augustine, JD'57, of the Office of Mr. Arthur D. Emil; Renato W. Beghe, JD'54, of Carter, Ledyard and Milburn; William W. Jochem, JD'54,

of Cravath, Swaine and Moore. Standing, Herbert W. Park, JD'57, of Debevoise, Plimpton and MacLean; Wesley J. Liebeler, JD'57, of Carter, Ledyard and Milburn; Allen S. Person, JD'57, of Shearman and Sterling and Wright; and Charles T. Beeching, Jr., JD'55.



The Honorable Irvin C. Mollison, JD'23, Judge of the U.S. Customs Court. Before becoming a member of the Court, Judge Mollison, a member of the class of 1923, practiced in Chicago for many years, where he served as a member of the Chicago Board of Education and was, and still is, associated with numerous learned societies, and civic betterment groups.





*Ben Herzberg, JD'22, of Hays, Sklar and Herzberg, a former Assistant United States Attorney.*



*Robert H. O'Brien, JD'33. Formerly a member of the Securities and Exchange Commission, Mr. O'Brien was associated for several years with American Broadcast-Paramount Theaters, Inc., ultimately as financial vice-president and secretary. He is now Vice-President and Treasurer of Loew's, Incorporated.*



*Alex L. Hillman, '24, publisher, President of Hillman Periodicals, Inc., formerly Special Counsel, U. S. Senate Committee on Appropriations, and U.S. Senate Committee of Foreign Relations; Recipient of Freedoms Foundation Award, Director of numerous companies.*





*Herman Odell, JD'36, a distinguished solo practitioner.*



*John N. Hazard, JSD'39, Professor of Public Law, Columbia University, Vice-President of the American Foreign Law Association, the American Branch of the International Law Association and the Section of International and Comparative Law of the ABA; an authority on International Law and Soviet law in particular.*



*Frank H. Detweiler, JD'31, of Cravath, Swaine and Moore, Chairman of the Committee on the Surrogates' Courts of the Association of the Bar of the City of New York; member of the Distribution Committee of the New York Community Trust.*





Charles B. Baker, JD'38, President of Universal Atlas Cement Company.



Donald B. Cronson, JD'48, of Cravath, Swaine and Moore, formerly law clerk to Mr. Justice Robert H. Jackson.



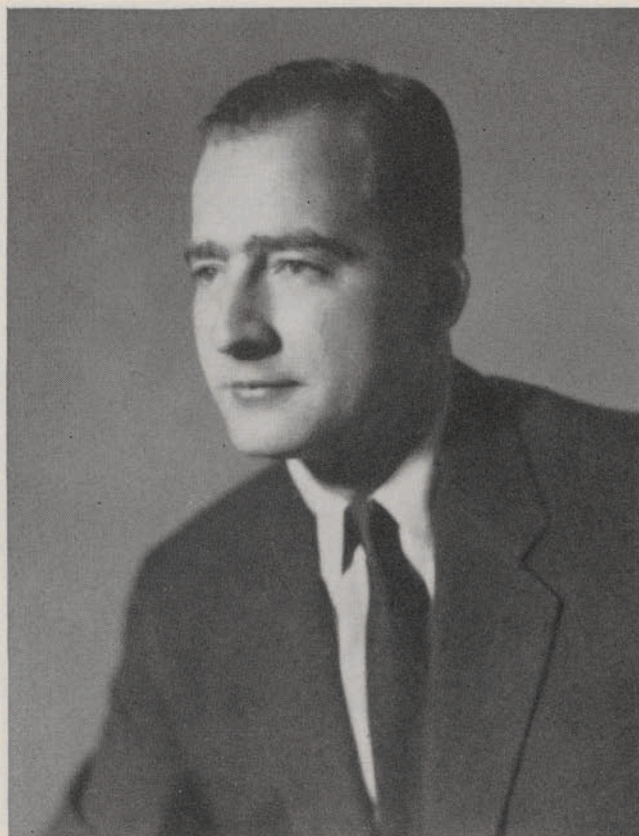
Byron E. Kabot, JD'41, formerly law clerk to Mr. Justice Stanley Reed, now with the International Paper Company.

Sylvester Petro, JD'45, Professor of Law, New York University, widely known for his work in labor law.





*Bernard D. Cahn, JD'33, who served extensively with the SEC, was associated with the War Production Board and with Military Government during the war, and is now in private practice, specializing in SEC matters.*



*Charles E. Brown, III, JD'48, of J. H. Whitney and Company.*



*Jerome S. Katzin, JD'41, at one time Director of the Public Utilities Division of the SEC, now associated with Kuhn, Loeb and Company, and active in a number of other business enterprises.*

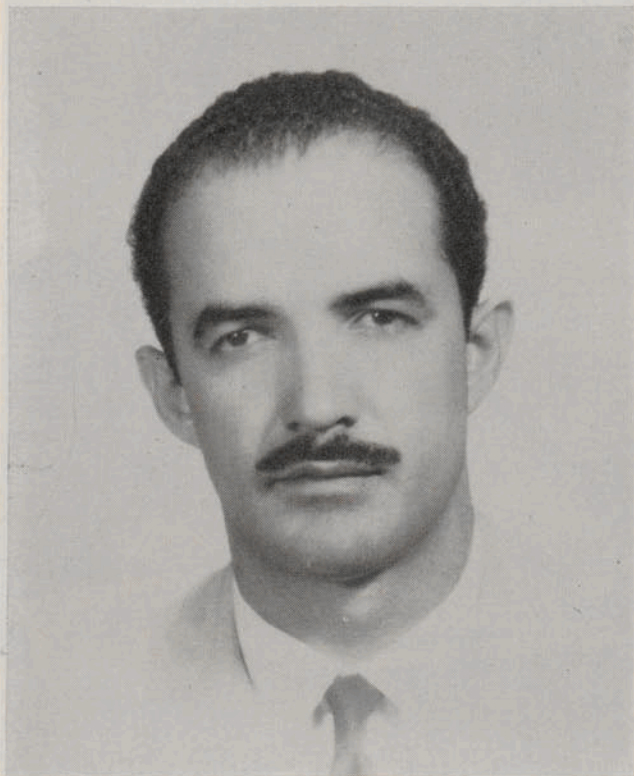




*Kent V. Lukingbeal, JD'42, of Dewey, Ballantine, Bushby, Palmer and Wood.*

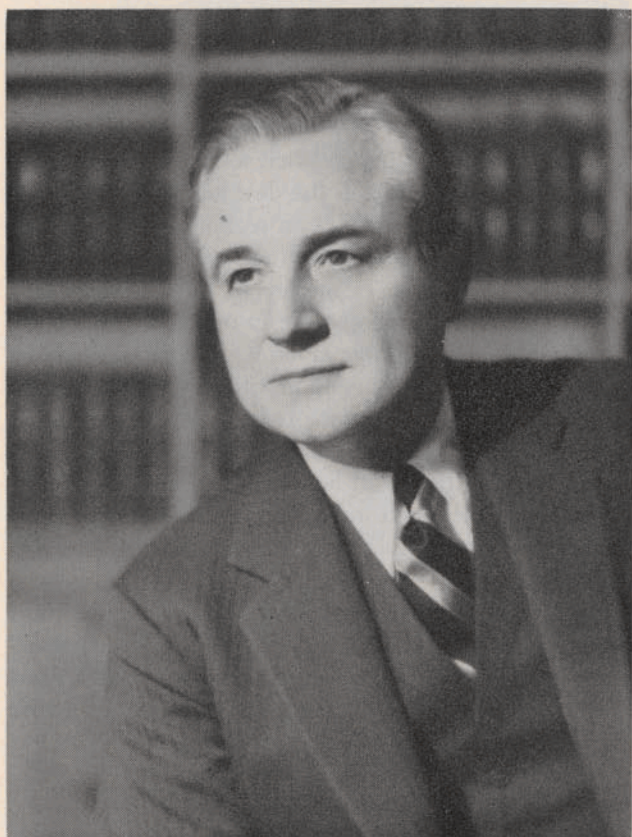


*George F. James, Jr., JD'32, a former member of the Law School Faculty, now Treasurer of the Standard-Vacuum Company.*

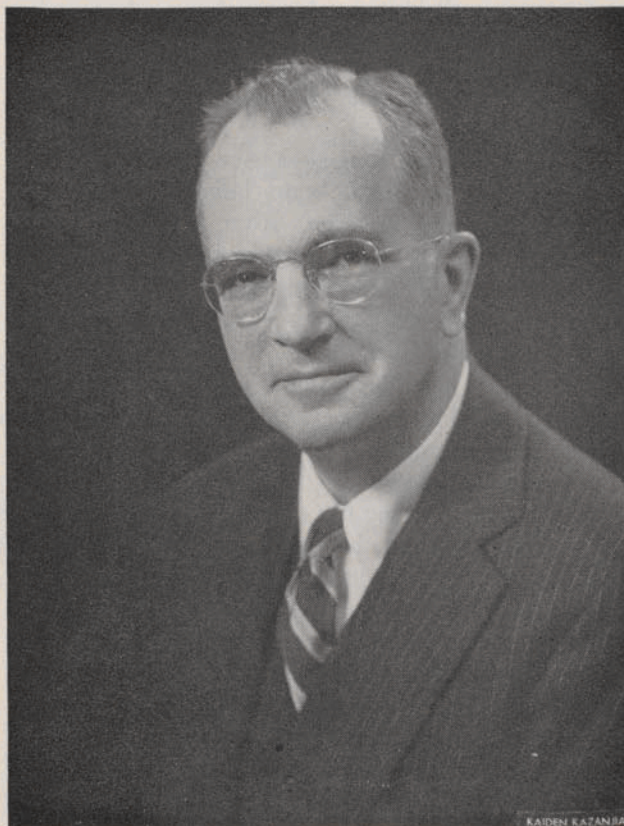


*Jorge E. Illueca, JD'55, of Panama City, Panama. Mr. Illueca is now residing in New York, where he represents his country on the Security Council of the United Nations.*





Lowell C. Wadmond, JD'24, of White and Case. He has served, among many other civic activities, as President of the Metropolitan Opera.



Roswell Magill, JD'20, of Cravath, Swaine and Moore, former Undersecretary of the U.S. Treasury Department.



John B. Howard, JD'42, Director of the International Training and Research Program of the Ford Foundation. Before joining the Foundation, Mr. Howard was a senior adviser in the United States Department of State. He had served as Special Assistant to the Secretary of State, Regional Adviser to the Bureau of Near Eastern, South Asian and African Affairs, and in a variety of other positions.



## CHICAGO, FACULTY PROFILE

*Karl Nickerson Llewellyn*

A typical day for Karl Nickerson Llewellyn begins early for it is during the hours before breakfast that much of his work is done. After preparing coffee, which he maintains is best done by steeping, he begins the day's work. Whatever his project, the first draft of written work invariably is done on yellow, lined, legal-sized paper, and usually in pencil, a yellow lead pencil. These implements are important in the craft of lawyering to Mr. Llewellyn, who is not convinced that an attorney can function as efficiently on a white, unlined leaf. During the morning and throughout the day, he fills up several pages with letters to authors of articles he has read, letters to editors, ideas for lectures or articles, and perhaps poetry. He produces such a quantity of material that only a part of it is ever worked into final form.

Much of Professor Llewellyn's working time at home and in his law school office is spent in preparing lectures to be presented to his classes. He never uses old lecture notes, but always reworks the material he has in the light of his present thinking on the subject, adding new material and deleting other. His constant revision is remarkable since nearly all of Professor Llewellyn's life in the law has been spent in teaching. After receiving his LLB from Yale Law School, he served as an instructor in law while he completed his work for a JD. He then accepted a position with the New York law firm of Shearman and Sterling, although he probably considered his work there to be more of a continuation of his interest in negotiable instrument law than as the start of a career in the practice of law. While a member of the firm he had the opportunity to work with the New York banks in revising the forms which they used in international trade. From his experience with banking problems, he developed an interest in letters of credit and cable transfer questions which has continued throughout his career and is evident in his work as the Chief Reporter of the Uniform Commercial Code. After two years, Llewellyn returned to continue his teaching career at Yale Law School. He then served on the faculty of Columbia University where he held the chair of Betts Professor of Law. He was a guest professor at the University of Leipzig and Visiting Professor of Law at Harvard Law School. In 1951 he joined the University of Chicago Law School as Professor of Law in which capacity he is presently serving.

In the actual presentation of his materials in class, Karl Llewellyn is much the same today as he was when he taught his first class in Negotiable Instru-

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*Advancement of the Law*

By KARL N. LLEWELLYN

*Professor of Law, The University of Chicago Law School*

[Reprinted, by permission, from *The Student Lawyer, the Journal of the American Law Student Association*, Volume 3, Number 4, April, 1958.]

What one notices first and most about the Law School of the University of Chicago is the combination of fire and drive with roundedness and balance. There is no uniqueness merely in the presence of a large full-time faculty full of distinguished scholars and teachers. There is no uniqueness in the development and use of a varied battery of instruction techniques in addition to the more usual case-class and occasional lecture. There is no uniqueness merely in the presence of a highly select student body, nor in one small enough to make possible a striking amount of personal contact and instruction. There is no uniqueness merely in sustained insistence on vision, range, the human background and the political and social problems native to sound work in the legal field; neither can uniqueness be found in sustained insistence on the importance of the materials and teachings of the other social disciplines.

Although it can indeed be doubted whether any other school at all rivals Chicago's stress on theory and workshop practice in basic lines of legal craftsmanship, the distinguishing characteristic of the school remains the way in which that stress is fitted into harmony with such other attributes as have been mentioned, the way in which all such things are merged into a working, rounded whole.

This characteristic becomes most clear if one runs the eye over the history of American law schools and notes how each notable advance has tended to come at one or another high price in exaggeration. The growing point of the decade or the region has always been exciting for the teachers concerned and for some or most of the best of the students; but the bulk of the class, who need formed and sustained lines of instruction, have commonly missed out in regard to various important matters which were not at the place and the moment in the focus of conscious attention.

Take for example the huge gain which came from introducing schools at all. Here was a beginning of order and of system in legal training, the substitution of a reckonable course of study for the hap-hazardness of the older reading-and-apprenticeship approach. It was another huge gain to develop the full-time teacher, whose teaching of his students can become his life, and is in no event merely a by-product or a touch of

*Continued on page 28*



Governor Stratton—  
Continued from page 1

The opportunity to talk to you here today is one I have been anticipating for some weeks. It is good to be here, especially since we are today honoring the science of law and particularly those persons who have chosen careers in law.

As we meet here, we are in a great worldwide struggle of ideas. It is therefore fitting that we should honor our most priceless heritage—the Rule of Law. Ours is a government of laws and not of men, because the founders of this country recognized that the rule of law and liberty are indivisible. There are many countries today which do not recognize this principle, and it is imperative that we maintain eternal vigilance to protect our heritage.

Aristotle once said that in all well-organized governments there is nothing which should be more jealously maintained than the spirit of obedience to law, especially in small matters. He added that lawlessness creeps in unperceived and at last ruins the state; just as the constant repetition of small expenses in time eats up a fortune. The great philosopher recognized the importance of Rule by Law. He knew well that man, the best of beings, when separated from laws and justice, becomes the worst of all. For justice is the bond of men, and the administration of justice is the principle of order in any political society.

"Law," said Cicero, "arises out of the nature of things." He defined it as right reason which, in accordance with nature, applies to all men. By its commands, he said, this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad, Cicero contended. This, we know, is the expression of a natural law theorist.

On the other hand there is the positivist or legal realist. His view is that law is fundamentally a series of rules by which a state governs society. Both of these definitions are correct, today, in some respects and wrong in others. To define law properly, both theories must be judged together. The fallacy of the one view is that it confounds law with ethics; the fallacy of the other is that it confounds law with force.

As Pascal stated with respect to government, both reason and force are essential for any proper concept of law. Law without the power of government to enforce it is not law but morals. Law without the basis of morality and reason is not law but tyranny. If a choice were to be made, it is evident that natural law is probably the most important since right will eventually make might, but might cannot make right. Law must of a necessity arise out "of the nature of things" and her true voice is the voice of reason. Still, we cannot ignore the fact that it is the nature of our

society and our relationships within that society that determines what shall and shall not be law.

We must recognize that these necessary relationships form the basis of the law by which our society lives, and that the rules of law are deduced by applying reason to these relationships. If we are to be governed by law and not be arbitrary will, we should recognize these facts. We should understand natural law and be able to interpret it. And through study of the ideal system of natural law, we should acquire the ability to perfect the rules of law enforced by the state.

From this it is evident that not only is law essential for order in a community, but it is also a proper expression and enforcement of natural law in a free society, an essential for individual liberty. Only through law can the rights of individuals be protected from the power of government and only through law can the citizens themselves exercise sovereign power. This is the basic concept of our national constitution which has become a model for free governments.

It is not a collection of "thou shalt, and, thou shalt not." Nor is the constitution a reference guide for government action applicable only to the officers of that government. It is law, basic law, embodying the principle of exercise of sovereign power by the people and their representatives. It embodies three basic concepts. The first of these recognizes that the individual has certain natural liberties and inalienable rights which the state has no power to regulate. The second is that the people shall exercise sovereign power in matters concerning themselves, that people of states shall exercise sovereign power in state matters, and people of the nation in matters affecting the country as a whole. The third is that no single person, office, or agency shall exercise complete sovereign power, but that it shall be divided into three distinct branches, executive, legislative, and judicial.

Our constitution set forth in clear, unmistakable language that government existed for men, not men for government; that men, regardless of their economic or political stature, were to enjoy these God-given rights; and that neither their officers in the various branches, nor their courts, could deny these rights to the humblest of citizens. It implied that law is order, and good law is good order. It established rule by law rather than rule by individual. But, I also believe the founders of our nation recognized that many people are controlled by necessity rather than by reason, and by fear of punishment rather than by love of duty, a very practical outlook.

We recognize that it is through the judicial processes that the rights of the individual—these practical rights as well as the legal rights which our system of government emphasizes and guards—are made effective. Courts exist for that reason. It is to the courts



that the individual goes to seek justice—not as a matter of privilege, but as a matter of inalienable right.

To us here today, these facts may seem a tedious recitation of something we already know. We in America take these rights for granted and assume that such is the status now, was, and ever shall be. Unfortunately, we cannot rely on this assumption. In many countries today these illusions have been shattered. Their citizens realized too late what was happening to them. In these countries there are no laws as we know them, no courts and no juries. Rule is by the individual, by the iron fist, and millions of people today are governed not by law but by force.

The average American is too prone to say, "but it can't happen here." Too many are engrossed in their own personal problems to worry about something which they believe cannot affect them in any possible manner. We need only reflect that in many countries now ruled in this fashion, they too had rule of law. We were not unique in that respect. But somehow, somehow, this rule was superseded by the rule of individuals.

As a result, millions of citizens have lost their rights—the same rights that are guaranteed by our own constitution. What law is left in these countries is a mockery to justice. Courts are virtually non-existent—as we know them—in many cases. The rights of citizens are trampled and transgressions against public and private institutions are the rule rather than the exception.

The awareness, in the legal profession, of this threat to the individual is to the credit of that profession. For example, the active role of lawyers in one drive for an international court of habeas corpus, is a manifestation of the deep faith the legal profession has in the rights and freedoms of the individual, regardless of his citizenry, his position, wealth or background. Such concern for the individual, I know, exists beneath the blanket of force which covers much of the earth today, but, tragically, is being smothered, I fear.

With this evil force spreading across the face of the Earth, ours becomes a struggle of survival. It is no longer a matter of difference in international customs and heritage. It is now a struggle to preserve our own orderly processes of law against the threat of lawlessness. We are in the midst of that struggle now. Nothing can be more evident to anyone who has studied history. This has always been the first object of any oppressor—destroy the court system—then replace that orderly system with his own individual rule.

It becomes obvious then, that the interests of the legal profession are closely interwoven with the interests of government itself. So it must certainly follow that an alert, strong judicial system is a vital part of a vigorous, alert government. Many of you here will take part in that system and others of you, no doubt, will find other

careers in government work. With this in mind, I would like to examine briefly with you some of the problems we in government are facing.

First of all, we must recognize that there has been a tremendous growth in government processes and consequently the administrative law. It would be impossible to conduct this vast area of government without.

For the first time in nearly fifty years we are now legislating in a body which represents the people fairly. A proportionate voice has been given to all segments of population and area, and this fair representation has been insured in future years through a system of mandatory, periodic redistricting by population.

In our administrative branch of state government, we were able to make sweeping, much needed changes during the 1957 legislative session. Particularly in the area of fiscal control, we were able to bring about a centralization of responsibility, and a streamlining of administrative function. This change is already yielding the state substantial savings in tax money.

In our third branch of state government, the one in which you are most interested, the judicial branch, we are on the threshold of sorely needed changes. I am certain that most of you are acquainted with the new judicial article for amendment to the state constitution which will be voted in a general referendum this fall. Our present judicial article satisfied very well the needs of the government and population when it was established in 1840. But it is woefully inadequate for our present-day government.

For a government based on the rule of law, the present backlog of court cases is a shameful disgrace. It is ridiculous when viewed against the intent of rule by law as set up in our 1870 constitution—to give speedy justice to all. No government based upon mercy and justice can neglect these facts.

Plato speaking in his dialogues had this to say about such a situation—and I quote—"Even when laws have been written down, they ought not to remain always unaltered. As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for rules must be universal, but actions are concerned with particulars"—end of quote.

His words ring true today, just as they did when he spoke them to his students in ancient Greece. Actions are concerned with particulars. And the particulars today are the legal delays that can be blamed on crowded, badly organized courts. We realize that in any field there is always some tendency to resist change. We also recognize that any change made merely for change's sake is senseless. But to resist a change as sorely needed as the one in our judicial system because of selfish or local interest is monumental



backwardness.

Let me say here that the necessity for improving this situation is an immediate, pressing problem. It is not something that can be set aside for some future indefinite solving. Citizens are being deprived of their access to justice—something that is their basic right. It is a dangerous situation. People are quick to sense danger when our legislatures or courts seem to lose sight of their purposes. But this access to justice is an element that has fewer automatic safeguards than have our legislative and judicial systems. If we neglect it, the dangers are multiplied manyfold.

I sincerely believe that we as citizens are being denied one of our most precious assets—justice, speedy justice. I believe that you here who are students of



At the reception for Governor Stratton preceding his Law Day Lecture, left to right, Mrs. Lawrence A. Kimpton, Hon. William G. Stratton, Governor of Illinois, Lawrence A. Kimpton, Chancellor of the University, and Mrs. Stratton.

the law should keep in mind these basic ideals not only in law school, but in their practical application. It becomes important that you who are going to be the future lawyers know these facts. If you cultivate an active and intelligent interest in public affairs, you will qualify as leaders of public opinion and eventually as our leaders in public office.

Interest and action with respect to all of these matters are essential to the good lawyers, and, if you pursue the law in the spirit of Justice Holmes, you will achieve the desired results. Let me end by quoting him:

"Law is a business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and when I perceive what seems to me to be the ideal of its future, if I hesitated to point it out and press toward it with all my heart."



The Board of Editors of the Student Lawyer, national publication of the American Law Student Association. Left to right: Jay K. Longacre, Marion, Ind., A.B., Wabash College; Allan C. Engerman, Chicago, A.B., University of Illinois; Gloria Martinez, El Paso, Texas, A.B., Texas Western College; Joe A. Sutherland, Editor-in-Chief, Fort Worth, Texas, A.B., Texas Christian University; and John D. Proffitt, Lebanon, Indiana, A.B., Wabash College.



The officers and directors of the Law Student Association, left to right: John G. Satter, Jr., of Iowa, A.B., University of South Dakota, President; James C. Hormel of Minnesota, Princeton University, A.B., Swarthmore College; John V. Gilhooly of Rhode Island, St. John's Seminary; Ronald E. Tonidandel of Connecticut, A.B., Amherst College; and Charles E. Hussey of Maine, A.B., University of Maine.



## The Henry Simons Lectures

The Law School recently inaugurated a new biennial lecture series, the Henry Simons Lectures. This series has been established in recognition of the contributions of Henry Calvert Simons (1899-1946) to Political Economy, and as Professor of Economics in the Law School from 1938 to 1946. Professor Simons' essays are collected in *Economic Policy for a Free Society*, University of Chicago Press, 1948. His major work in the field of taxation is contained in two books published by the University of Chicago Press: *Personal Income Taxation*, 1938; *Federal Tax Reform*, 1950.

The first Simons lecture was delivered in February by George J. Stigler, Professor of Economics, Columbia University. The lecture, entitled "The Goals of Economic Policy" is to be found in this issue of the *Record*. A reception and dinner honoring Professor Stigler were held at the Quadrangle Club prior to the lecture.



Nathan Blumberg, Professor Malcolm Sharp, and Dugald McDougall, JD'37, at the reception for George Stigler.



Students, faculty and guests at dinner before the Stigler Lecture.

## THE HENRY SIMONS LECTURE

### *The Goals of Economic Policy*

By GEORGE J. STIGLER

*Professor of Economics, Columbia University*

I prize the privilege of delivering the first of a series of lectures which will commemorate the work and character of Henry Calvert Simons. My pleasure is not in the least diminished by the conviction that he would have protested at the suggestion of such a series of lectures—perhaps likening them to the rigid, weathered structures erected to military heroes, with the lectures sometimes bearing a sufficient resemblance to the nervous, edible birds which hover about them.

And in one sense he would, of course, be wholly right: the real tribute to a scholar is the continued life of his intellectual work, and no amount of praise periodically heaped upon dead ideas will warm them to life. The work of Simons has received this tribute: it continues to be in the center of a main current of political economy which he did so much to create, and today his thought is as relevant and as far-sighted as it was in the moment at which it was written. From this viewpoint, the highest compliment one can pay a scholar is to quarrel with him or to go beyond him, and I am absolutely certain that Simons would second my invitation to future lecturers to exercise the privilege more freely than I shall.

But in another sense, Simons would have had no right to protest the establishment of these lectures for they honor something that belongs to his friends as much as to him: his character. This wondrously complex man, of exalted integrity, brilliantly witty, exquisite of taste, generous toward others and unreasonably demanding of himself—this man we are entitled to honor, and without permission. I interpret my lecture, not as a tribute—he deserves much better than he will receive tonight—but as a reminder to the world that we continue to love our friend.

I shall speak tonight on the proper goals of economic policy.

Three goals have long dominated economic policy in this country, and in the Western World. The first and most ancient goal is the largest possible output of goods and services. Maximum output has evolved, under the impact of social events and economic analysis, into a two-pronged goal:

First, to employ as fully as possible—that is, as fully as the other goals allow—the resources at the society's disposal. Unnecessary unemployment of men and capital should be eliminated.



Second, to employ these resources as efficiently as possible. Broadly speaking, no resource should be used in one place if it would produce more elsewhere—it should be impossible to reshuffle resources to achieve more of some goods without getting less of others.

The second goal is the growth of the economy. Natural resources should be prospected, capital accumulated, and new products and technologies discovered. These forward looking activities have for their common end a steady rise over time in the level of income relative to population.

The last primary goal of economic policy is a comparative newcomer, still a vague sentiment when maximum output had been entrenched for centuries. It is the reduction in income inequality. The goal of equality, or at least of much reduced inequality, has become one of the great forces of our times.

These three goals, maximum output, substantial growth, and minimum inequality of income, have provided the justifications for every important innovation in economic policy. Maximum output is the purpose of our free trade within the United States, the combatting of monopoly, and various antidepression measures. The growth of income is intended to be served by our various conservation measures, much of public education, our public land policy, and the current flirtation of the federal government with basic research. Minimum inequality is the goal of the personal income tax, agricultural policies, public housing subsidies, unemployment insurance, and a host of other policies. Of course I simplify when I identify a policy with only one goal—it is a poor protagonist of an economic policy who fails to argue that it will serve all the goals of economic policy, and that it is also wholly in keeping with the Scriptures.

There are, to be sure, a variety of minor goals of policy. The desire to eliminate racial discrimination has led to certain regulations of economic life, and again, the desire for personal equality of treatment independent of income has led to other regulations, such as prohibitions on personal railway rate discrimination. But these goals have had only minor and sporadic effect upon economic policy.

One need hardly emphasize the obvious fact that many of the policies we have adopted have ill-served any of these goals. The farm program was adopted to help a class of families with low average incomes and possibly to conserve resources, but quite probably it has increased income inequality, at least within agriculture, and it is extremely doubtful that any useful conservation of resources has been achieved. The tariff was presumably designed to increase domestic output, but economists believe it has never been an effective policy to this end. There have also been plain raids on the federal treasury, such as the silver purchase pro-

gram, which have only the most tenuous connection with the goals of policy. But every society makes mistakes in achieving its goals: often it misunderstands the efficacy of a given policy in reaching a given goal; and often the announced goals are merely cloaks worn by particular groups seeking particular ends. These aberrations and deceptions do not constitute a contradiction of the primacy of the goals of maximum output, substantial growth, and decreased income inequality.

A question that can be raised with respect to basic goals is whether they are fully attainable. I would say that they should not be. An abstract goal gives direction to economic policy, just as the North Pole gives direction to a compass, and just as the compass becomes useless at the magnetic North Pole, so the goals of policy lose their value as guides once they are fulfilled. *Specific* goals, such as so many television sets or highway miles or dollars of tax receipts, must usually be realizable, but general goals should not be fully realizable.

Whether one accepts this position or not, I think it is fair to say that at the present time the basic goals are widely believed to be tolerably well fulfilled in the United States.

Consider income inequality. Few people think that the progression in the personal income tax is seriously insufficient and many think it is excessive. Public sympathy for groups traditionally viewed as disadvantaged, in particular labor unions and farmers, is at low ebb. It would be wrong to say that "underprivileged classes" has been deleted from the lexicon of neo-liberalism, but the concern for them has lost urgency and to some degree has been supplanted by concern for the peoples with highly developed desires in underdeveloped economies.

The satisfaction with the productive performance of the American economy is even more complete. We feel rich. We believe that on average we are denied only luxuries over whose absence no one can wax indignant. It is true that the workingman still has only a black and white TV set, and his car is several years old, but so what? Who really cares whether a farm program, or a river and harbor pork barrel, wastes a billion dollars, or less than one day's output of the American economy? Who believes that the rate of growth of income is seriously inadequate, or that unemployment of resources in recent years has been grievously large? Even the critics of the Thirties have been silenced or turned into flatterers. In as populous a nation as ours there still exist critics of the productive performance of the economic system, but they are in the uncomfortable position of criticizing the form of a golfer who wins all the tournaments.

This sense of prosperity, I am certain, is a temporary thing. The postwar growth of consumer real income,



compared with 1932-45, has been so sudden and so large that we have not been able to build up new desires, but they are gradually emerging. That celebrated axiom of economics, the insatiability of human desires, has survived the much greater increases in real income achieved at earlier times. In another decade or so we shall be complaining, and with sincere pain, of the widespread need to satisfy elementary decencies such as a summer cottage, the electronic range, the wholly air-conditioned house, and the family psychiatrist. But for the moment we are well off.

Not only should the basic goals of economic policy be unattainable—they should also be part and parcel of the civilization of a society. Ours are not. Our basic goals are the same as the basic goals of the Russians.

The Russians also believe in equality of income. Their fundamental ethical claim, indeed, is that they will remove all income differences not strictly justifiable by social performance and/or need, and in particular will not allot any part of income to a class of private owners of the means of production. I would quarrel violently with their belief that private property is not a basic institution of economic progress, but the argument is being settled for many people by the substantial growth of output of the Russian economy. We may also argue that the inequalities of income in Russia are large, and not so closely related to social performance as our own inequalities. Important as these questions are in assessing the extent to which a society achieves its goals, they seem to raise arguments over policies rather than over goals.

And the Russians share the goals of maximum output and rapid economic growth. Indeed every society that is purposive and non-traditional seeks to do efficiently whatever it seeks to do. The differences among societies arise with respect to what output they seek to maximize. In our society the output to be maximized is chosen primarily by the individual consumers; in the Russian economy the output to be maximized is chosen primarily by a central, dictatorial body. Hence, the Russian desired output contains more munitions and heavy industrial equipment, as a share of total output, than the American desired output, but this again is a difference in content (of immense importance, to be sure) rather than in goal.

Now, I do not wish to imply that a goal loses validity because it is shared by an unfriendly person. It does not seem sensible to abandon Mozart simply because one encounters a boor who also admires his music. And to spurn a goal such as maximum output is to spurn rational behavior.

Nevertheless, the fact that our economic goals are the same as the Russians' is anomalous: one would expect two great powers to have carried into their economic goals some elements of the political philos-



*At dinner before George Stigler's Henry Simons Lecture, left to right, Robert Zener, Editor-in-Chief of the University of Chicago Law Review, Professor Stigler, and Aaron Director, Professor of Economics in the Law School, who introduced Professor Stigler.*

ophies that lead to their antipathy and rivalry. The fact that our goals and the Russian goals are the same has also contributed mightily to the failure of American foreign policy—a policy which has no cutting edge of political philosophy that might attract the leaders of other countries. We offer the same goals, and differ chiefly in promising less with respect to their fulfillment.

The reason I wish to propose a somewhat different set of goals than those we now profess, however, is not to set ourselves apart from Russia, nor is it to capture the intellectual leadership of the neutral world—although these are not negligible hopes. Even if the United States were the only body of land on earth or in space, we should urgently need to give direction and emphasis to our economic policies. It is high time that we set aside the details of managing a comfortable dormitory and concern ourselves with the kind of society we wish to inhabit.

The supreme goal of the Western World is the development of the individual: the creation for the individual of a maximum area of personal freedom, and with this a corresponding area of personal responsibility. Our very concept of the humane society is one in which individual man is permitted and incited to make the utmost of himself. The self-reliant, responsible, creative citizen—the “cult of individualism” for every man, if you will—is the very foundation of democracy, of freedom of speech, of every institution that recognizes the dignity of man. I view this goal as an ultimate ethical value; others may wish to reach it through powerful utilitarian arguments.

It is one thing for a value to have verbal sovereignty; it is quite another for it to permeate the social system. Individualism has few enemies in the United States, but its many friends are becoming less



fervent and its influence upon the course of events is shrinking at an alarming rate. One would incur ostracism in our universities if he denied that man should be free to think what he wishes, but increasingly he is looked upon as a quaint survivor of ancient times if he believes that man should be master of his fate, even when he bears the main effects of his own decisions. The faith in the individual has been much impaired by a fairly new doctrine, a very old belief, and the changing structure of society.

The fairly new doctrine is that of environmental determinism, which we owe to men as diverse as Godwin and Marx. On an ever-widening scale it is being argued that social institutions mold the character of man: that the food and housing, family, neighborhood, and education of the child have a decisive influence upon the way he thinks and behaves as a man. No one can doubt, in the light of generations of social research, that this theory contains much truth. Its thrust is evident: interest is inevitably shifted from man's exertions to the social environment which to a considerable degree determines the nature and direction of these exertions.

The very old belief is that most men are incapable of conducting their affairs wisely. Only in the nineteenth century did this belief temporarily lose its dominance: at the threshold of the period of universal education it was widely believed that the vast majority of the population could be educated to so high a level of rationality that it could be trusted with the control of public affairs as well as the proper conduct of personal affairs.

Now that the great majority of our population receives at least 12 years of formal education, it is no longer possible to expect great results—one must observe them. And on the whole I sense a growing disillusionment, although direct documentation of this disillusionment is rather difficult to present because the miracle of education still provides, for too many intellectuals, the anchor of their democratic faith and the emblem of their ethical respectability.

If I may judge by my own discipline, however, the skepticism about the individual is reappearing in explicit form. The consumer, according to professional economic literature, is a complaisant fellow, quick to follow the self-serving mandates of Madison Avenue or of a long distance call from a stock broker located just beyond the reach of extradition. This consumer is commonly given only the virtue of consistency, and it is not clear whether his choices are treated as well-ordered because his follies are reflexive, symmetrical, and transitive, or because if they were not, his indifference curves would intersect.

I suspect that other disciplines are becoming equally outspoken, but we may document the declining faith in the individual by something almost as strong as



*Herbert Brook, JD'36, and Roscoe T. Steffen, John P. Wilson Professor of Law, at the reception for Professor Stigler which preceded his lecture.*

words—actions. Most intellectuals are in favor of increasing governmental control over education (compulsory attendance, certification of teachers, control of curricula and school year, etc.) and of increasing intervention by state and federal governments in local governmental control of education. Yet education is surely the one field in which, if education imparts either wisdom or logical training, one would most confidently expect that increasing authority be reserved to the individual and the small political unit.

The last component of the declining faith in the individual has been the increasing complexity and mutual dependence of social relationships in an urban industrial society. The effects of an individual's behavior upon others become large. A farmer with deplorable sanitary habits may be an affront to humanity; a similar city dweller is an immediate hazard to his neighbors. An eccentric or timid pioneer (if this latter is not a contradiction in terms) bears the main costs of his deficiencies; a similar entrepreneur can throw a thousand blameless men out of work (not very long, however). A man, in short, can be trusted with hostile Indians, but not with friendly citizens.

I hope that I have sketched with some plausibility the causes of the decline of faith in the unregulated and unguided individual, for each contains a good deal of validity. Each has also been much exaggerated. No social research has shown that a man's behavior is independent of his will, or that in our society his potentialities of achievement are rigidly set by his environment. Our trust in education has been a narrow, academic faith, and we have almost forgotten that there are such things as non-academic abilities or that the schoolroom is only one, and not the major, center of education for life. And if our society is growing more complex, it is also offering a variety of opportunities for individual choice quite beyond the





The SRO sign was out as George Stigler launched the Henry Simons Lectures.

dreams of earlier times.

One can nevertheless concede much validity to the main sources of decline of faith in the individual, and yet not budge one inch from the goal of individual freedom. That men are not independent of their environments does not mean that they should be denied the opportunity of determining their lives, and their environments, as far as this is possible. That education does not turn most men into scholars does not reduce the value of allowing them to make their own wise and stupid decisions. That the increasing interdependence of men calls for a continuing review of their rights and duties is no reason for assuming either that no opportunities for new freedom arise or that conflicts can be settled only by coercion. We shall wish to revise the particular content of individual freedom and responsibility as our society, and as our understanding of our society, change, but always there is the problem—the transcendental problem of all liberal societies—of seeking to enlarge the individual's share in conducting his life. Men are not mere social animals, to be governed into prosperity or tranquilized into non-unhappiness.

Let us return to our traditional goals of economic policy. Two of them—maximum output and substantial growth—are ethically neutral: they could be adopted by a nation of gourmets or ascetics or warriors, by tyrants or by democrats. What ethical content they possess has been introduced, almost surreptitiously, by defining output as that which is desired by free men.

We have placed the main burden of direction of social policy upon the goal of reduced income inequality, and it cannot bear this burden. It represents, indeed, quite fairly one element of the basic value of individualism: humanitarianism, in the form of the desire to eliminate poverty and its concomitants such

as malnutrition and untended illness. Much as we may quarrel among ourselves as to the proper way in which to eliminate such ugly things, all of us wish to be rid of them.

For the rest, minimum income inequality has a very dubious congruence with our basic values. One would fear for the individual in a society where a small group of extremely wealthy individuals had the (monopoly) power to exploit others or the (financial) power to subvert the political process. Neither threat is real or potential: we have too many wealthy people to collude, and too few to exert a directive influence upon political life. The goal of minimum income equality has at best an adventitious, and at worst a perverse, relationship to individual freedom.

The goal of individual freedom does not lead automatically to a cut and dried program of economic policies. Continuing research will have to go into the discovery of the meaning of freedom under changing social conditions and continuing ingenuity of high order will be required to contrive policies which will increase this freedom. It would be much more attractive if I could propose immediately a series of policies which were wholly novel, irritatingly paradoxical, and—after the smoke of battle had cleared—irresistibly persuasive, but in good conscience I cannot.

Precisely because the tradition of individual freedom has been so fundamental to our political philosophy, the most obvious corollaries of it are well known, and these corollaries, like the goal itself, will appear outmoded to many eyes. Yet the implications of the goal are not simply a formalized description of life at some admired date in history: we have never done as much



At the reception for Professor Stigler, left to right: Gordon Insley, JD'57, a student in the Foreign Law Program, Professor James Stauss of Grinnell College, Professor Stanley Heywood of Coe College, Professor Jo Desha Lucas of the Law School, James Walsh, of Australia, and Robert Carswell of Northern Ireland, Commonwealth Fellows at the Law School.



or as well as we could, and today are doing very poorly.

Consider the policy of competition. This policy has a basic role in striking down limitations to individual freedom and challenging individual capabilities, in better proportioning rewards to efforts. Yet the policy is rapidly losing its popular support and its vitality. On the one hand there is a growing faith—it is no more than this—that the giant enterprise is the home of progress; on the other hand, the argument that monopoly reduces income has little emotional appeal to a rich nation.

If we place a main value on the individual, however, there is no justification for our complacency. Since the War our antitrust policy has drifted into a spiritless action against the more blatant forms of conspiracy and monopolization. While the federal government has been opening up these backlots to individual freedom, it has quietly been erecting barriers to individual action throughout the prairies of economic life, with its paternalistic small business programs and the regulation of competitive industries such as agriculture, motor trucking, and housing.

Our programs to assist distressed industries collide directly with the policy of competition, and they seem to me a clear instance of the abandonment of individual freedom not because it is an obstacle to other goals, but because freedom is not at the front of policy. Should we, as we almost always do, ease the problems of these industries by restricting output, stockpiling it, fixing prices—each a policy serving to decrease the freedom and responsibility of the individuals who are in these industries or who wish to enter them? We can achieve the same humanitarian purpose by helping individuals to move to more remunerative industries and localities by providing educational facilities, informational services, travel grants, and other policies designed to widen their range of alternatives.

When did we last initiate a large federal program to increase the range of productive activities open to the individual, or to enlarge the scope for individual freedom within an area? Recent answers are hard to come by. The question would be just as difficult to answer if we addressed it to the heads of state and local governments, even could we distract them for a moment from such important work as the licensing of scores of trades such as yacht salesmen, exacting oaths from wrestlers that they are not subversive, but mostly imploring a higher governmental level to take over their functions.

We now have innumerable policies designed to protect the consumer, including some that protect him against low prices. Obviously we should help to protect him against those forms of fraud which he does not actively seek out, but should we protect him



George Stigler, speaking in Breasted Hall.

against unwise behavior? If we prohibit gambling to preserve him from moral weakness or actuarial myopia, should we not also supervise his investment portfolio to keep his uranium holdings down to a prudent level? My complaint against such policies is less that the wisdom of a course of action is usually debatable than that there is nothing admirable about an involuntary saint.

The policies designed to influence the distribution of income call for thorough restudy in the light of the goal of individual freedom. The main objection to a progressive income taxation beyond that implicit in the alleviation of poverty is that it imposes differential penalties on personal efforts that poorly serve the goal of inciting each individual to do his best. Almost the only instrumental defense for such a tax is that large incomes are "unfair." The main possible meaning of this charge is that large incomes are not fully earned. When this is true, and the extent of its truth has received embarrassingly little study, why do we not deal directly with the institutions which give rise to large, systematic, and persistent earnings beyond what the community believes are just?

The inheritance of wealth may be one such institution. The right to unlimited, or at least very large, bequest has customarily been defended in terms of its effects upon the donor, with very little consideration of the possible effects on the donees. It has traditionally been argued that the donor is led to vast exertions and to continued thrift. Yet the need for relatively free bequest to stimulate large efforts is surely debatable: we find that men also make immense exertions in areas such as politics, the arts, and the sciences, where the chief legacy of a highly successful man to his son is an inferiority complex. On the other hand the large inheritance of wealth probably has the effect of reducing the incentives to the heir to exercise his full capabilities—he has received



the gold medal at the beginning of the race. Since there are precious values in the family itself as an institution, we cannot eliminate all gifts (let alone intellectual gifts!) and bequests, but it may be advisable to tax inheritances (including gifts during life, but *not* estates) much more severely than we already do.

These comments on policies are highly tentative, but I hope that they are sufficient to indicate that a thorough-going philosophy of individual freedom and responsibility would lead to programs that are neither consistently "radical" nor consistently "conservative" by our present standards. We do not have such a thoroughgoing philosophy at present: we have been content to defend the freedoms of the individual once or twice a year, when the attack on them is unusually direct and brutal, and complacently design our policies in complete neglect of this goal the remainder of the year. No one has a greater responsibility than the university community, which is among the chief beneficiaries of a regime of freedom, for reviving faith in this goal and for developing its implications for economic, and in fact for all social policy.

#### *Llewellyn Lecture*

*Continued from page 18*

extra income or an avocation or a sop to an idealism "for which practice leaves no room," nor even one expression of a richly-living man's desire to ride a two- or four-horse team. But the price for these conjoint advances came close to being as great as the gain. Both the courses and the full-time teachers were concentrated on the rules and fields of law, "positive" law, the rules largely as they stood at the moment, indeed dominantly the rules "of substance." There was some reason for this. The rules and fields of our law were in chaos; they cried for organization. And one can understand the initial neglect of the crafts if the school was to provide, reliably, precisely what apprenticeship did not so provide.

#### *How Chicago Teaches Craftsmanship*

Less justifiable and more unfortunate was Joseph Story's influential curriculum at Harvard concentrating on his straight "private" law, cutting out that whole perspective and background of philosophy and of national and international governmental practice which had laid the foundation of such lawyers as Hamilton, Kent, Calhoun, Webster and indeed Story's self. Harvard itself is still laboring on the needed recapture of what Story butchered out, but like every first-rate school has long been at that job; the law school at Chicago, the entry-port by which Administrative Law and Theory of Legislation came into the American law school world, was founded with the

objective of such recapture.

It is also difficult to understand why, as the law schools all over the country became parts of universities, they so long and persistently shut their eyes to their duties of the exploration and inculcation of the principles of craftsmanship. With the waning of apprenticeship the arts of the legal crafts slipped into the forgotten or into disrepute; either they were wholly neglected or they were seen in terms not of deep truths about man's nature and man's life with his fellowman, but as matters of shallow and often ignoble artifice and trickery. Yet the arts of law are not only essential to any professional work, they are also law's common ground with those humanities which are a university's core and pride, and among which law should stand with the proudest.

When the arts come to be slighted the answer does not lie in shunting the responsibility, turning for example as Columbia just proposed to an entrance test in writing. The job is instead to *develop* in the student rough carpentry and even skill in writing—in *legal* writing, which as it ranges from statute and document through to the brief and the negotiating letter runs the gamut of all kinds of writing there are, outside of formal verse. This is not hard to do, nor is it hard, as one works in the instruction for accuracy and conciseness and simple structure, to press also for life and style. The brief, for example, and the statute, provide teaching apparatus unmatched by the arts college. But the job does take conscious thought, and some effort.

#### *Theory and Workshop Instruction Go Hand-in-Hand*

That thought and that effort Chicago finds time for on a scale not matched in this country, readily, if at all. Hand in hand with it go theory and workshop instruction in such basic crafts as advocacy and counselling—each viewed whole and as a discipline, with details of substance used as a good case-book uses cases: to inform discussion and raise questions more than to purvey information. The reference here is not alone to the elementary composition which results for every student from his first year tutorial research. It is not alone to the counselling experience available in the school-run legal aid work, but to the sustained theory-and-practice of such a "course" as "Commercial Law Practice," not alone to the general moot court system and competition which is paralleled in many schools, but to the developed theory which lays the basis of the workshop "course," "Legal Argument." Similarly, in the area of legislation, there is not alone the universal introduction by way of second-year tutorial work, but the basic theory that underlies each of the three or more seminars in current legislation.

Three of Chicago curative procedures on the side of perspective and vision call for particular mention. As



with many another school, the work of the federal government generally and of the Supreme Court of the United States in particular come for heavy attention, from federal taxation and jurisdiction and the due process and full faith and credit phases of conflict of laws on through admiralty, the federal aspects of labor law and the rest.

But on the international side there is not only a useful branching out from International Law as commonly conceived into specialized work in international commercial and investment problems (courses, not seminars), but there is a most interesting comparative law development: a full year's intensive work in a foreign legal system and its language is offered, followed by a year's locally-supervised study and practice in the relevant foreign country—a novel and ingenious device for equipping an American to do legal work across national and language barriers.

The second next matter on the side of vision and perspective can be indicated very briefly: jurisprudence. There is not only an intensive course for second or third year (weekly papers) on "Jurisprudence Law in Our Society"; there are in addition no less than four further seminars in one or another important aspect of jurisprudence, given by five other instructors from four or perhaps five other and further points of view. One of the *compulsory* first year courses has a full half of its five hours devoted openly and happily to jurisprudence. But the most interesting deliberate exposure to divergent points of view is the third matter of mention. The general federal government course, "Constitutional Law" is given by three different instructors from three sharply divergent angles, while at least three further approaches appear prominently in other instruction. It is well nigh impossible for any student to get through the school without heavy exposure to two or more of these philosophies of government. The corridors resound.

There has, of course, been no thought in all of this of so rebelling against the narrowness of the law school's first great contribution as to allow the benefits of that contribution to slide away. The full-time law faculty at Chicago is large, distinguished and devoted. And such work—taken by almost all students—as that in estates, corporations and taxation provides full and repeated exposure to what it is fair to call the classical style of doctrinal architecture in a "field" of law.

#### *Case-Book Instruction Is a "Wasteful Road"*

The same holds in regard to the second great advance in American legal education, the invention and spread of the case-book. But not too many students are fully aware of the price we have come to pay for

case-book teachings and, above all, of the ways in which today's case-books have tended to defeat the finest values open to the case-method. The price is of course in first instance one of time-consumption: the case-book is a horrifying wasteful road to information about rules of law, while the modern editor who feels that he must "cover" "the subject" is visited with material as complex as that which faced the editor of seventy years ago.

The case loses the life-contact and life-meaning which are its essence when its facts are edited out. Moreover the case has no instructive value on how the judges do their work if its complexities are edited out, and no training value for argument if counsel's points are omitted. In addition the case loses its very discussion value if it is presented alone and simply to illustrate or communicate its rule, instead of appearing with companion cases to show development or to challenge to thoughtful distinction and synthesis and in either aspect to clothe the general situation in question with detail and flavor enough to turn student's policy-judgment into more than a guess or a day-dream.

Again Chicago both capitalizes the virtues of the invention and cuts down price and waste. While case-instruction dominates the first year and even the second, it is case-instruction based on materials which in instance after instance have been edited in the finest original tradition: cases selected for discussion value and for challenge; the cases presented in full; if "collateral" discussion is excised, the bearing of its content is indicated; companion cases presented in quantity; and the like—with no hesitance at using text-stuff for "coverage," if the class-hour is filled with intensive discussion.

Moreover—and not alone in those federal-oriented courses which properly center on the Supreme Court, as in the very intensive series of cases on Competition and Monopoly—a whole series of cases in a relatively narrow area has been developed (sometimes from a single jurisdiction) to enable real study of growth, force exact analysis, and afford practice in argument with the same materials which were available to each successive bench.

#### *Chicago Has Achieved A Healthy Balance*

Finally there are the courses which vary the diet by centering class-discussion on problems of counselling, and those which use as the major material for use statues fresh enough to force original solution of questions out of the study of their text, without advance inquiries by any court. These last types of instruction mean grateful change of pace in the instruction. They also work in easily and quietly with the emphasis on



counselling, some phrases of writing, and both theory and practice of drafting.

The most recent of the major innovations in American law teaching has been the spread of materials, interest and inquiry into the general societal and government area of problems for government and law. For forty years there has been drive and talk and hope and experiment in this direction, with more effect on teachers and on scholarly production than on curricular architecture or the individual class-room. Chicago has achieved as close an approach to healthy balance here as the country has yet seen.

The pioneering explorations into behavioral science for which the school has become famous have not in the main touched the curriculum directly, though they have offered students opportunity to earn money in intellectually exciting work. But apart from the value to any school of having the thinking of faculty members profit by the ferment of frontier-research, one finds interesting direct values for teaching emerging from the studies of the processes of deciding, and one finds the students alert, and pleased to be alert, to the human richness of "law"—thinking which can draw on (while dominating, not being dominated by) the more usable results from neighboring disciplines.

The tradition of cross-fertilization is old at Chicago. Its law faculty has contained a logician-philosopher, long contained two economists, has in these recent days of behavioral inquiry added men from sociology and psychology. Such men do not interfere with the solidity of the school's training in the work of law. They add—as each of the other aspects mentioned adds—good measure of rich roundedness and balance. They add—mostly by way of influence on their legal colleagues—their part of that which makes the Law School of the University of Chicago not only a professional school of the first order, but a school of the humanities: a place where vision and sound measure live in concert.

#### *Llewellyn Profile—*

*Continued from page 18*

ments at Yale. He brings to his classes an enthusiasm for the law and a sensitivity and sincere dedication to the finer tradition of the lawyer's craft. His robust, fresh approach to law, and to life, induces him to develop new theories and ways of doing things which he enjoys discussing with his classes and his colleagues. His is the talent, moreover, of impressing a notion upon the minds of his students with a dramatic, almost indelible quality. His unique choice of words and illustrations and his coordination of vocal expression and gesture enable him to communicate with his students with an intensity and vividness they do not forget. One day after strongly emphasizing the dis-

advantages of paraphrasing a statute, he had his entire class repeat several times in unison the phrase, "Never paraphrase a statute." Someone in that class may some day paraphrase a statute, but it is doubtful he will do so without remembering that he should "Never . . .".

It has been suggested that Mr. Llewellyn is on occasion given to overstatement. Whether or not that is so, it is true that no one is more generous in praising a job well done than Karl Llewellyn. His great admiration for men such as Scrutton and Cardozo is well known and has been expressed by him many times; these were men with horse sense who could get to the barebones of a problem and come up with a lovely, clean law-job that bites. Speaking of such a man, Professor Llewellyn will sometimes strike the desk with his fist, shake his head and, with a twinkle in his eye, exclaim, "What a man it was!" On the other hand, it is equally true that few are more devastating in condemning a job considered to be poorly done; Mr. Llewellyn hates a lousy, lazy job and has no use for the man who did it, damn his soul, and does not hesitate to tell him so.

Professor Llewellyn and his wife, Soia Mentschikoff, also on the faculty of the University of Chicago Law School, reserve one evening a week for an 'at home' with their students affording them an opportunity to know their students better. Mr. Llewellyn is a widely read man, has many interests outside the law and is happy to talk with students on various topics whether or not related to law. This is typical of the personal interest Professor Llewellyn has always taken in his students. And many of the men who have studied under him write from time to time telling him of their plans and accomplishments.

A list of Mr. Llewellyn's interests outside of law should include his activity as a boxer while a student at Yale. His participation in sports today, however, centers mainly around golf which he plays regularly. The development and care of orchards is another subject which holds an especial fascination for Mr. Llewellyn, and is one in which he considers himself somewhat expert. Cats, of course, have been a great love of his for many years. He has owned several Maltese cats which he has even used as the subjects of some of his poems. For, in addition to the many books, articles and lectures on law he has published, Karl Llewellyn has found time to put together two books of poetry, *Beach Plums* and *Put In His Thumb*. His poems deal with a wide range of subjects which have interested him; some even deal with certain aspects of the law. But whatever the topic, they all contain the vitality and depth which characterize all of Professor Llewellyn's work, and which, in fact, characterize Professor Llewellyn himself.

Jack D. Beem, JD '55





The Board of Editors of the University of Chicago Law Review, with the competitors for Board Membership. (Editors in Roman) Left to right, front row: Mark Leiberman, Bangor, Maine, B.A., University of Maine; Herma Hill, Dallas, Texas, A.B., Southern Methodist University; Ralph Long, Chicago, A.B., Valparaiso University; Kenneth Howell, Birmingham, Alabama, A.B., University of Alabama and John Gilhooly, Providence, R.I., St. John's Seminary. Second row: Ronald Finch, Anna, Illinois, A.B., Southern Illinois University; Julius Kaplan, Washington, D.C., Wesleyan University; Philip H. Hedges, Portland, Conn.; A.B., Wesleyan University; Robert Doan, Chicago, B.S., Indiana University, M.S., University of Illinois; Richard Goodman, Detroit, A.B., University of Michigan; and Alan Washburn, Rapid City, S.D., A.B., Shimer College. Third row: Eric Rosenfeld, Pittsfield, Mass., A.B., Harvard University; Richard Scupi, Chicago, A.B., University of Chicago; Frank D. Mayer, Jr., Chicago, A.B., Amherst College; George Bobrinskoy, Chicago, A.B., Amherst College; Ronald Tonidandel, Stafford Springs, Conn., A.B., Amherst College and Robert Lofts, Alton, Illinois, A.B., University of Chicago. Back row: Merlin Baker, Provo, Utah, S.B., Brigham Young University, George Saunders, Jr., Birmingham, Ala., University of Alabama, Robert Zener, (Editor-in-Chief), Pittsburgh, A.B., University of Chicago, London School of Economics; John Ritscher, Longmeadow, Mass., A.B., Bowdoin College, and Michael Douty, Chicago, A.B., Swarthmore College.



## Theodore Roosevelt and The First Law Cornerstone

(When the cornerstone of the current Law Building was laid in April, 1903, the principal address was delivered by President Theodore Roosevelt. That speech is reprinted below as it appears in the University Record, Volume VII, May, 1902–April, 1903.)

Mr. President, men and women of the University, and you, my fellow-citizens, people of the great city of the West:

I am glad indeed to have the chance of being with you this afternoon to receive this degree at the hands of President Harper, and in what I have to say there is little that I can do save to emphasize certain points made in the address of Mr. Judson.

I speak to you of this University, to you who belong to the institution, the creation of which has so nobly rounded out the great career of mercantile enterprise and prosperity which Chicago not merely embodies, but of which in a peculiar sense the city stands as symbolical.

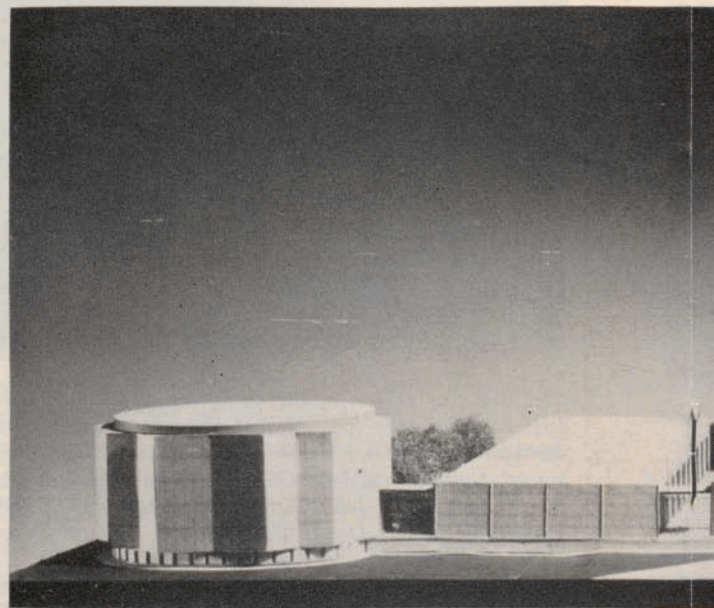
It is of vast importance to our well-being as a nation that there should be a foundation deep and broad of material well-being. No nation can amount to anything great unless the individuals composing it have so worked with the head or with the hand for their

own benefit as well as for the benefit of their fellows in material ways, that the sum of the national prosperity is great. But that alone does not make true greatness or anything approaching true greatness. It is only the foundation for it, and it is the existence of institutions such as this, above all the existence of institutions turning out citizens of the type which I know you turn out, that stands as one of the really great assets of which a nation can speak when it claims true greatness.

From this institution you will send out scholars, and it is a great and a fine thing to send out scholars to add to the sum of productive scholarship. To do that is to take your part in doing one of the great duties of civilization, but you will do more than that, for greater than the school is the man, and you will send forth men; men who will scorn what is base and ignoble; men of high ideals, who yet have the robust, good sense necessary to allow for the achievement of the high ideal by practical methods.

It was one of our American humorists who, like all true humorists, was also a sage, who said that it was easier to be a harmless dove than a wise serpent. Now, the aim in production of citizenship must not be merely the production of harmless citizenship. Of

A composite photograph showing the site of the new Law Buildings. The American Bar Center is on the left; a portion of Burton-Judson Courts, in which law students are housed, may be seen on the right. The photograph of a model of the new Law Buildings, shown directly above the site they will occupy, is reproduced in approximately the same scale.





course, it is essential that you should not harm your fellows, but if, after you are through with life, all that can be truthfully said of you is that you did not do any harm, it must also truthfully be added that you did no particular good.

Remember that the commandment had the two sides, to be harmless as doves and wise as serpents; to be moral in the highest and broadest sense of the word; to have the morality that abstains and endures, and also the morality that does and fears, the morality that can suffer and the morality that can achieve results—to have that and, coupled with it, to have the energy, the power to accomplish things which every good citizen must have if his citizenship is to be of real value to the community.

Mr. Judson said in his address today that the things we need are elemental. We need to produce not genius, not brilliancy, but the homely, commonplace, elemental virtues. The reason we won in 1776, the reason that in great trial from 1861 to 1865 this nation rang true metal, was because the average citizen had in him the stuff out of which good citizenship has been made from time immemorial, because he had in him honesty, courage, common sense.

Brilliancy and genius? Yes, if we can have them in

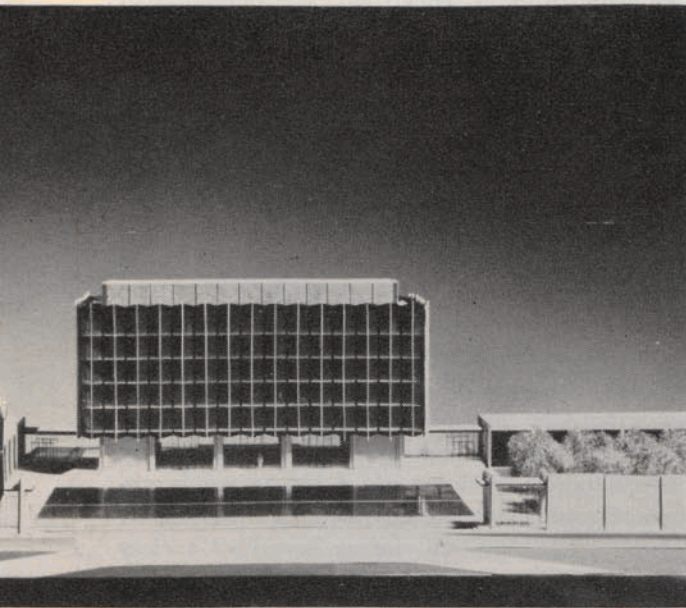
addition to the other virtues. If not, if brilliant genius comes without the accompaniment of the substantial qualities of character and soul, then it is a menace to the nation. If it comes in addition to those qualities, then of course we get the great general leader, we get the Lincoln, we get the man who can do more than any common man can do. But without it much can be done.

The men who carried musket and saber in the armies of the East and West through the four grim years which at last saw the sun of peace rise at Appomattox had only the ordinary qualities, but they were pretty good ordinary qualities. They were the qualities which, when possessed as those men possessed them, made in their sum what we call heroism. And what those men had need to have in time of war, we must have in time of peace, if we are to make this nation what it should ultimately become, if we are to make this nation in very fact the great republic, the greatest power upon which the sun has ever shone.

And no one quality is enough. First of all is honesty—remember that I am using the word in its broadest signification—honesty, decency, clean living at home, clean living abroad, fair dealing in one's own family, fair dealing by the public.

And honesty is not enough. If a man is never so honest, but is timid, there is nothing to be done with him. In the Civil War you needed patriotism in the

*Continued on page 34*





soldier, but if the soldier had the patriotism, and yet felt compelled to run away when that was needed, he was not of much use.

Together with honesty you must have the second of the virile virtues, courage; courage to dare, courage to withstand the wrong and to fight aggressively and vigorously for the right.

And if you have only honesty and courage, you may yet be an entirely worthless citizen. An honest and valiant fool has but a small place of usefulness in the body politic. With honesty, with courage, must go common sense: ability to work with your fellows, ability when you go out of the academic halls to work with the men of this nation, the millions of men who have not an academic training, who will accept your leadership on just one consideration, and that is if you show yourself in the rough work of actual life fit and able to lead, and only so.

You need honesty, you need courage, and you need common sense. Above all you need it in the work to be done in the building the corner-stone of which we laid today, the law school out of which is to come the men who at the bar and on the bench make and construe, and in construing, make the laws of this country; the men who must teach by their actions to all our people that this is in fact essentially a government of orderly liberty under the law.

Men and women, you the graduates of this university, you the undergraduates, upon you rests a heavy burden of responsibility; much has been given to you; much will be expected from you. A great work lies before you. If you fail in it you discredit yourselves, you discredit the whole cause of education. And you can succeed and will succeed if you work in the spirit of the words and the deeds of President Harper and of those men whom I have known so well who are in your faculty today.

I thank you for having given me the chance to speak to you.

White—

*Continued from page 1*

change by addressing his new colleague as "Grandfather Justice Brandeis."<sup>2</sup>

Another instance of White's playing the father role is revealed in Holmes complaining to Laski, "The C.J., who occasionally speaks to me as if I were unknown to the world at large, said the people thought I didn't work when I fired off decisions soon after they were given to me."<sup>3</sup>

Umbreit wrote of Edward Douglass White that he looked so much like a Chief Justice that he might have merited the position on appearance alone.<sup>4</sup> He refers to him as a monumental man, who gave the

impression of massive strength. William Howard Taft, who appointed him Chief Justice and later succeeded him in that office, said of White, "Massive, dignified, impressive as was his physical mould, his mental structure was like it. . . . His capacity for work was enormous."<sup>5</sup> Indeed, while he was a member of the Louisiana Supreme Court White wrote 80 opinions in 14 months.<sup>6</sup> During his 27 years on the Supreme Court of the United States he prepared more than 700 opinions.<sup>6a</sup> His memory was prodigious. His opinions, which were usually lengthy, he delivered orally.

He showed a strong sense of judicial responsibility. Taft, after pointing out that the study of cases with a view to their decision in conference is a greater task than the preparation of opinions, stated that no one could have been more conscientious in this regard than Chief Justice White.<sup>7</sup> In the opinions themselves White's sense of responsibility impelled him to dwell continually on the "consequences" that might follow a particular decision.

A suggestion of his general view in all cases is revealed in Holmes' complaining to Laski, "The A. B. Dick Co. sold a mimeographing machine to which was attached a plate which stated 'This machine is sold . . . with the license restriction that it may be used only with the stencil-paper, ink and other supplies made by A. B. Dick Co.'" The purchaser of the machine bought ink from another manufacturer, and the A. B. Dick Co. sued this manufacturer alleging an infringement of its patent. A majority of the court held with A. B. Dick Co. White's dissent foreshadowed the present majority view of the Supreme Court. His argument in part follows:

"My reluctance to dissent is overcome in this case: First, because the ruling now made has a much wider scope than the mere interest of the parties to this record, since, in my opinion, the effect of that ruling is to destroy, in a very large measure, the judicial authority of the States by unwarrantedly extending the Federal judicial power. Second, because the result just stated, by the inevitable development of the principle announced, may not be confined to sporadic or isolated cases, but will be as broad as society itself, affecting a multitude of people and capable of operation upon every conceivable subject of human contract, interest or activity, however intensely local and exclusively within state authority they otherwise might be. Third, because the gravity of the consequences which would ordinarily arise from such a result is greatly aggravated by the ruling now made, since that ruling not only vastly extends the Federal judicial power, as above stated, but as to all the innumerable subjects to which the ruling may be made to



apply, makes it the duty of the courts of the United States to test the rights and obligations of the parties, not by the general law of the land, in accord with the conformity act, but by the provisions of the patent law, even although the subjects considered may not be within the embrace of that law, thus disregarding the state law, overthrowing, it may be, the settled public policy of the State, and injuriously affecting a multitude of persons. . . .

"I cannot bring my mind to assent to the conclusion referred to, and shall state in the light of reason and authority why I cannot do so. As I have said, the ink was not covered by the patent; . . . This curious anomaly then results, that which was not embraced by the patent, which could not have been embraced therein and which if mistakenly allowed and included in an express claim would have been inefficacious, is now by the effect of a contract held to be embraced by the patent and covered by the patent law. . . ."

This paper will be concerned with White's contribution to the development of American law, principally in the antitrust field and in the field of administrative law. But, first, it will briefly sketch his family background and his career before he reached the Supreme Court.

He was of the fourth generation of Whites to be prominent in the American scene and the third generation to serve as a judge. His great grandfather, James White, was born in Ireland and came to America as a young man. He became prominent as a merchant in Philadelphia, and his name appears as a signer of the Non-importation Agreement of 1765. That he was of some scholarly bent is shown by his will, in which he left his Latin books to his son, also named James. The second James White, the Chief Justice's grandfather, studied medicine. He moved to Fayetteville, North Carolina, and was elected a member of the Continental Congress from North Carolina in May of 1786, and soon after was appointed the first U. S. Superintendent of Indian Affairs of the Southern Department. His interest in the efforts of the Continental Congress to draft the Constitution is shown by a letter to Governor Richard Caswell of North Carolina. After a short stay in North Carolina he moved to Davidson County, Tennessee, and was elected a delegate to the Territorial Assembly and by the Assembly was elected a delegate to the Congress of the United States from Tennessee. He was admitted to the bar in 1890. His son, Edward Douglass, the father of the Chief Justice, was born in Nashville in March 1794. In the same year, James White introduced a bill in the Assembly of the Territory of Tennessee to found Grenville College. He moved to Louisiana in 1799, at about the same time Daniel

Boone moved into Missouri. After the Louisiana Purchase, in 1803, Jefferson appointed him a judge. He served on the bench until his death six years later.

His son, the first Edward Douglass, became judge of the City Court of New Orleans in 1825, at the age of 31. He was elected to Congress in 1831 and served three terms consecutively. One of his contemporaries in Congress was David Crockett. He voted for the Compromise Tariff in 1833. That caused his defeat, when he ran for his 4th term in Congress, but in the next year he was elected Governor of Louisiana on the Whig ticket. He served with distinction as Governor. Under Louisiana law the Governor was not eligible for a second consecutive term. However, he served two more terms in Congress before he retired to his sugar plantation. There the Chief Justice was born, on November 3, 1845. White's mother was Catharine Sidney Ringgold, a daughter of a pioneer Maryland family, whom the Chief Justice's father had met while serving in Congress. The Chief Justice's uncle is the Ringgold immortalized in the song, "Maryland my Maryland."<sup>9</sup> White's father died in 1847 at the age of 53. His mother married again, to a man named Brousseau.

White was enrolled in the College Preparatory Department of the Jesuit School in New Orleans at the age of 6. Four years later, he attended Mount St. Mary's in Emmitsburg, Maryland. After a year in this school, he transferred to Georgetown College, where he remained until the outbreak of the Civil War in 1860. That ended his formal education at 15 years of age, except for a few months when he is believed to have studied in the Jesuit College in New Orleans during the following year.

At 16, White enlisted to fight for the Confederacy as a private. He was promoted to the staff of Brig. General Beale. He saw active service and was taken prisoner at the Battle of Fort Hudson in 1863.

In 1865, at 20, he commenced the study of law in the office of Edward Bermudez. Louisiana, of course, retained the civil law as enacted in the Code Napoleon, so all White's early training was in Civil Law. But after White was admitted to practice, at age 23, he applied himself to the study of the common law as well as the civil law, so that he might represent clients with litigation in the federal courts. In a short time, he developed a successful practice in both the state and federal courts.

He was also active in politics and took part in the fight of the people of Louisiana against the carpetbag government of the reconstruction era. He is reported to have used a musket in an armed battle on the levee to overthrow the Kellogg Government. He was elected in 1874, at age 29, to the Louisiana Senate where he served one term. Then Governor Nichols appointed him an Associate Justice of the Supreme Court of



Louisiana.

The theme of White's political life in Louisiana was the bitter fight carried on by the Nichols forces against the corrupt state lottery. In the end Nichols and White triumphed and the lottery was abolished, but the struggle had its ups and downs. At about the time of White's appointment to the State Supreme Court, the Nichols administration got the legislature to revoke the charter of the lottery company.

After White began his service on the State Supreme Court the anti Nichols-White forces succeeded in amending the state constitution to write the lottery into the state's fundamental law and to set up a new Supreme Court. The entire court was out. White was always proud of his service on the State Court, because during the short period of his service the court caught up on its docket, which had been heavily in arrears.

During the next decade White did not hold political office. He devoted himself to the practice of law, forming a partnership, first of Spencer & White and later White, Parlange & Saunders. His practice was successful. White was primarily a student. He spent almost all his time, not taken up in court appearances, in his office. It was said that there the light seldom was extinguished until dawn. To pursue his research in civil law he would consult the original sources in Latin, Italian, Spanish and French. French, indeed, was a second mother tongue to him, and the other languages he spoke and read fluently. He lived in the French Quarter of New Orleans until he moved to Washington, and a great deal of his law practice was from the French community. In fact, some thought that the family name had originally been Le Blanc. Even after his ascent to the Supreme Court he continued his interest in languages and late in life undertook the study of German. By his years of practice in New Orleans, White earned universal regard as a great lawyer with a profound knowledge of both civil and common law.

During the same period, he was one of the moving figures in founding Tulane University. In 1882, when White was 37, Paul Tulane of Princeton, New Jersey, placed a large endowment in the hands of trustees, including White, to found a university. Believing that the cause of education in Louisiana would be strengthened if the proposed university were to be combined with the State University, White devised a plan, implemented by a constitutional amendment, which allowed a transfer of the State University to the Tulane trustees to found what is now known as Tulane University. White remained associated with the administration of the University until 1897.

White was active in Bar Association activities. He became a member of the New Orleans Law Association (the predecessor to the Louisiana State Bar

Association), on June 10, 1871, and after leaving the State Supreme bench he took an active part in the affairs of the Association. On November 20, 1880, he was made a member of its committee on membership. This position he retained until after his election as United States Senator. This committee also passed on complaints against lawyers of unprofessional conduct. On November 17, 1883, he moved the appointment of a committee (on which he served) to reorganize the keeping of the records of the District Court of Orleans Parish. The following year he was a member of the committee to persuade the State Legislature to transfer the law books in the State Library to the Law Association. White also served as chairman of the State Board of Bar Examiners.

In 1888, then 43 years old, he returned to politics and became campaign manager for Nichols in his bid for another term as governor. The issue was the notorious Louisiana lottery. Nichols won the election and rewarded White by supporting him for the United States Senate. He became Senator on December 7, 1891, and served until he was appointed by Grover Cleveland, in March 1894, an Associate Justice of the Supreme Court of the United States.

Shortly after his appointment to the Supreme Court, White married Mrs. Leita Montgomery Kent, a widow of a Washington lawyer, an old friend of his, and a sister-in-law of the late Senator Gibson of Louisiana. They had no children. The Whites became known as an hospitable couple, famous for good food and good conversation. He was on intimate terms with senators and congressmen and other public figures.

After he joined the Supreme Court all other activities were subordinated to the work of the court. For example, in spite of his continuing interest in Georgetown University, he refused its offer of a chair in the law school, although Harlan and others combined teaching with service on the Supreme Court. He resigned as vice president of the board of Tulane University. He even refused to attend dinners of the Gridiron Club, because of his care for the dignity of the court. When President McKinley offered him a place on the commission to negotiate peace between Spain and the United States in 1898, he declined the appointment.

His friendship with Theodore Roosevelt began in 1901. At that time Roosevelt sought his advice on the question of beginning legal studies which would occupy his time and fit him to be a better presiding officer in the Senate. White advised him that attending a law school would be derogatory to the office of Vice President. He proposed that Roosevelt read law books from a list prepared by White and that White would give him a quiz every Saturday afternoon. The work was to have started in the Fall, but the plan was abandoned when McKinley's assassina-



tion made Roosevelt President.

Roosevelt in a letter to Henry Cabot Lodge, discussing Lurton's fitness for the Supreme Court, said, "On every question that had come before the bench, he has so far shown himself to be in much closer touch with the policies in which you and I believe than even White, because he has been right about corporations where White has been wrong."<sup>10</sup> White's point of view on legal and economic questions was much closer to President Taft's than to Roosevelt's. In 1909 and in 1910, Taft consulted White about appointments to vacancies on the court. As late as the campaign of 1916, Taft sought information from White concerning whether Hughes would accept the Republican nomination for the presidency. White assured Taft that he would.<sup>11</sup> Taft appointed White Chief Justice in December of 1910. The appointment was generally well received.

Before the appointment and after Fuller's death, Holmes wrote to Pollock as follows: "As to the Chief Justiceship I am rather at a loss. I should bet he will appoint Hughes, who has given up a chance of being Republican nominee for the Presidency, but I know nothing. I think White, who is next in Seniority to Harlan (too old, etc.) the ablest man likely to be thought of. I don't know whether his being a Catholic would interfere. I always have assumed absolutely that I should not be regarded as possible—they don't appoint side Judges, as a rule. It would be embarrassing to skip my Seniors, and I am too old. I think I should be a better administrator than White, but he would be more politic. Also the President's inclination so far as I can judge seems to me towards a type for which I have but a limited admiration. I am afraid White has about as little chance as I."<sup>12</sup>

Taft's brother, Horace, wrote to the President, December 15, 1910: "The appointment of White was glorious . . . I see nothing but favorable comment."<sup>13</sup> The confirmation of the new appointment by the Senate came within 15 minutes of its reception.

At the time that White joined the Supreme Court administrative law was almost non-existent. It would be difficult to exaggerate the importance of this field of law today. Because White's long service on the bench (27 years) coincided with the need to spell out the role of the Interstate Commerce Commission in regulating the railroad industry and because of White's interest and aptitude in this field, this branch of the law owes more to White than to any other judge. In fact, he might be called the Father of Administrative Law in the "case and controversy" sense, as Ernst Freund is the Father of the academic consideration of administrative law.

The rise of government by administrative body was inevitable. With the passing of the frontier and the



Prior to Mr. Fitzpatrick's lecture, shown above are, rear row, members of the Executive Committee of the Committee for the Edward Douglass White Lecture Hall, Walter J. Cummings, Jr., P. Newton Todhunter, JD'38, Thomas R. Mulroy, JD'28, Chairman, Michael I. Igoe, Jr., JD'57, and W. McNeil Kennedy. In the front row, Hon. William J. Campbell, Judge, U. S. District Court, Honorary Chairman, Hon. F. Ryan Duffy, Chief Judge, U. S. Court of Appeals for the Seventh Circuit, Honorary Chairman, Hon. Michael I. Igoe, Judge, U. S. District Court, Honorary Chairman, and Hon. Julius Hoffman, Judge, U. S. District Court.

growth in size and complexity of economic and social life, it became evident that there would have to be comparable development in the machinery of government. The tasks were becoming too many to be carried out by old agencies of government, separated from each other in three branches, executive, legislative and judicial. A new system was evolving. A particular area of governmental concern would be set aside by Congress and entrusted to a new agency which would have governmental power (partly legislative, partly executive and partly judicial) in the field assigned it. The prototype of this new form of organization, the regulatory commission, was the Interstate Commerce Commission created in 1887.

Immediately following the Civil War there was a great period of railroad building. This railroad expansion was subsidized by grants of right of way, loans, subsidies and outright gifts of millions of acres of public land. Additionally, state governments, counties and municipalities almost competed with one another in generosity to the railroad builders. In the panic of 1873, the people of the Middle West and Far West began to realize that they were not receiving the advantages that they had expected from the railroads. There were abuses: exorbitant freight and passenger rates, watered stock, discriminatory rebates to powerful shippers, and free passes to state legislators and other people of influence. These evils were aggravated by the attitude of certain of the railroad magnates. Thus Leland Stanford said, speaking to a gathering of railroad officials, "There is no foundation in good reason for the attempts made by the general



government and by the states to especially control your affairs. It is a question of might and it is to your interest to have it determined where the power resides."<sup>14</sup>

The American people endured the abuses with extraordinary patience, believing "That government governs best which governs least." However, in the midwestern states there was a growing reaction and the Illinois Constitution of 1870<sup>15</sup> contained a clause directing the legislature to pass laws to prevent unjust discrimination and extortionate rates of freight and passenger tariff on the different railroads in the state. The legislature then passed laws prohibiting discrimination and establishing a maximum rate, and created a railway and warehouse commission to regulate railroads, grain elevators and warehouses. This legislation was denounced as socialistic, but when it reached the United States Supreme Court, in *Munn v. Illinois*,<sup>16</sup> in 1876, Chief Justice Waite upheld the Illinois Statute as an extension of the historical right of the state to regulate businesses with a public interest, such as, inn-keepers, common carriers and ferries.

On the same day that the court sustained the validity of the Illinois Statute, it handed down decisions approving the right of a state to establish maximum freight and passenger rates.<sup>17</sup> The period of public regulation of railroads by state governments lasted about ten years. Then the United States Supreme Court nullified an Illinois law attacking the "long and short haul" evil<sup>18</sup>, and three years later the court declared rate regulation by a state legislative commission invalid.<sup>19</sup> These decisions put an end to state regulation of railroads. Congress responded with the Interstate Commerce Act of 1887. It specifically prohibited pooling, rebates, discrimination of any character and higher charges for a short haul than for a long haul. It provided that all charges be "reasonable and just" and it required the roads to post their tariffs. To administer this law Congress established the first permanent administrative board of the American Government, the Interstate Commerce Commission. In 1906, the Hepburn Act authorized the Interstate Commerce Commission to determine and prescribe maximum rates.

Of course, ideas which are clear to us today were not so at the time that White started to write his famous opinions on the Interstate Commerce Commission. It was White's contribution to the development of law that he integrated the regulatory commission into our private and public common law, and did it in such a way that it appears almost a child of the common law. This was not an easy task because it involved the division of authority between the national government and the states and the delineation of the relationship of these new agencies to the executive branch of the government, to Con-

gress and to the courts. Decisions by White and by the court over which he presided established basic principles, such as, that there had to be a definite grant of governmental function to the commission by Congress, that the commission had to follow procedure consistent with due process of law, that when the commission adopted a procedure, the parties had a right to insist that it be followed—and perhaps most important of all—that when the commission was given a function of government to perform by Congress that the courts would respect its role and not usurp it.

One of the important administrative law cases decided by White was *Texas & Pacific Railway v. Abilene Cotton Oil Co.*<sup>20</sup> Justice Frankfurter explained the significance of this decision: "In order to avoid mischievous opportunities for the assertion of individual claims by shippers as against the common interest of uniformity in construing railroad tariffs, this Court so construed the Interstate Commerce Act in the famous *Abilene Cotton Oil* case as to withdraw from the shipper the historic common law right to sue in the courts for charging unreasonable rates. It required resort to the Interstate Commerce Commission because not to do so would result in the impairment of the general purpose of that Act. It did so because even though theoretically this Court could ultimately review such adjudications imbedded in the various judicial judgments—if a shipper could go to a court in the first instance—there would be considerations of fact which this Court could not possibly disentangle so as to secure the necessary uniformity. The beneficent rule in the *Abilene Cotton Oil* case was evolved by reading the Interstate Commerce Act not as though it were a collection of abstract words, but by treating it as an instrument of government growing out of long experience with certain evils and addressed to their correction. Chief Justice White's opinion in that case was characterized by his successor, Chief Justice Taft, as a 'conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law'." Finally, Justice Frankfurter epitomizes his evaluation of White's opinion as "A creative act of adjudication unanimously accomplished."<sup>21</sup>

Another of White's precedents in administrative law is *Oceanic Steam Navigation Co. v. Stranahan*.<sup>22</sup> This case involved the validity of a congressional act empowering a custom's official to impose penalties. The statute was attacked on the ground that the imposition and enforcement of penalties was primarily a judicial function. White rejected the contention because it magnified the judicial to the detriment of all other departments of the government. The effect of this case was to give greater scope to the action of administrative agencies, and, like Marshall's decision in *Marbury v. Madison*, to define the power of the



courts.<sup>23</sup>

In the case of *East Tennessee, Virginia & Georgia Ry. Co. v. Interstate Commerce Commission*,<sup>24</sup> White held that substantial findings of fact of the commission made after hearings were not subject to review if they had not been questioned in the lower court. In another case he further developed the law with regard to findings of fact made by an administrative body to support its determination to the effect that if the findings by the commission were not of sufficiently substantial character to sustain the order then the court did not have the duty to undertake an independent investigation of the facts in order to substantiate the order.<sup>25</sup>

Another decision of White was *U. S. ex rel Kansas City Southern Railway v. Interstate Commerce Commission*.<sup>26</sup> An amendment to the Interstate Commerce Act empowered the Commission to evaluate property owned by a common carrier. The commission failed to do this even at the request of the railway, claiming that it was impossible to arrive at an evaluation. White held that the Commission had erred in refusing to exercise the authority granted to it, and that in so doing, it was actually assuming authority it did not possess.

A landmark decision of White in this field was *U. S. v. Sante Fe*,<sup>27</sup> wherein speaking of the commissioner of the general land office and his subordinates, White held that the function of government sought to be exercised by the administrative body must be one which comes under the role assigned to the body by Congress.

White, in another case, stated the basis of judicial review of administrative rulings as follows:<sup>28</sup>

"Beyond controversy, in determining whether an order of the commission shall be suspended or set

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The Officers and Directors of the Mandel Legal Aid Association, the student group responsible for student participation in the work of the Mandel Clinic. Left to right, Darrell Kellogg, Hiawatha, Kansas, A.B., U of Kansas; Matthew E. Brislawn, Pullman, Washington, A.B., Washington State College; Alford Penniman, Rockford, Illinois, A.B., Carleton College; Neale Secor, President, Maywood, N. J., A.B., Drew University; Frederick P. Roehr, Kansas City, Mo., A.B., Rice Institute; Carter D. Peebles, Oak Park, Illinois, University of Stockholm, A.B., DePauw University; and James Weldon, Glenside, Penna., A.B., Amherst College.



Hon. William J. Campbell, Judge of the U. S. District Court and Honorary Chairman of the Committee for the Edward Douglass White Lecture Hall, introducing Mr. Fitzpatrick.



Donald H. Fradkin, a student in the Law School, at work in the offices of the Mandel Legal Aid Clinic.



White—

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aside, we must consider, a, all relevant questions of constitutional power, or right; b, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, c, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power . . . Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."

Speaking of this case and of two others handed down by White on the same day, Edward H. Mosely, Secretary of the Commission, wrote to F. W. Carpenter, then Taft's secretary, explaining, "I am sending three opinions of the Supreme Court of the United States, speaking through Mr. Justice White, which were rendered last Monday and which so strongly strengthen the power of the Commission."<sup>29</sup>

In a letter to Laski, Holmes said ". . . I think the credit is wholly his (White's) about making the relations between the Interstate Commerce Commission and our court clear and putting the whole important business on a sound and workable footing."<sup>30</sup>

Chief Justice Taft in speaking of White's opinions in this field said: "(They) are models of clear and satisfactory reasoning which give to the people, to state legislatures, to Congress, and the courts a much needed knowledge of the practical functions the Commerce Commission was to discharge, and of how they were to be reconciled to existing government machinery . . . They are conspicuous instances of his unusual and remarkable power for facts and statesmanlike interpretation of statute law."<sup>31</sup>

Somewhat similar to the need to control and regulate the railroad industry was the need to control the great combinations of wealth that grew up in America toward the end of the 19th century. Laws to regulate trusts and monopolies were motivated by the desire

to end corrupt and dishonest practices and by the fear that the natural resources of the country were being ruthlessly exhausted and that small businessmen were being faced with ruin. In 1890, the Sherman Act was passed by Congress. Every contract, combination, in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations was declared to be illegal, and every person who should monopolize or attempt to monopolize any part of trade or commerce among the several states was made guilty of a misdemeanor.

Taken literally the Sherman Act would have forbidden almost every contract or combination. White would not accept such an indiscriminate application of the law. In his famous dissent in *United States v. Trans-Missouri Freight Assn.*,<sup>32</sup> 166 U. S. 200, 351, (1897) he argued, "To define the words 'In restraint of trade' as embracing every contract which in any degree produced that effect would be violative of reason because it would include all those contracts which are the very essence of trade and would be equivalent to saying that there should be no trade, therefore, nothing to restrain." The dilemma which would necessarily arise from defining the words (contracts in restraint of trade) so as to destroy by rendering illegal the contracts upon which trade depends, and yet pre-supposing that trade would continue and should not be restrained, is shown by the argument advanced, and which has been compelled by the exigency of the premise upon which it is based."

The following year the *Addyston Pipe* case appeared on appeal before the 6th Circuit Court of Appeals.<sup>33</sup> William Howard Taft wrote the opinion for the court. In sustaining the government's contention, that the combine in question was illegal, Judge Taft began by stating that the (majority) opinion in the *Trans-Missouri* case would be a sufficient answer to the defendants, since the majority opinion held every restraint of trade to be forbidden by the Sherman Act. However, he then proceeded, by an analysis of the authorities, to show that the practices of the defendants could not be considered reasonable in the common law sense. Five years later suit was brought by the government to dissolve the holding company set up by Hill, Morgan and Harriman, the *Northern Securities* case.<sup>33a</sup> The majority held that there was a violation of the Sherman Act. There were four dissenters: White, Fuller, Peckham and Holmes, on the ground that the Sherman Act did not apply to contracts concerning the ownership of stock.

It was in the *Standard Oil*<sup>34</sup> and *American Tobacco* cases<sup>35</sup> that White, then Chief Justice, speaking for the court, with only Harlan dissenting, defined and explained the rule of reason, distinguishing between



those economic combinations that were harmful and those that were useful in modern society.

Two criticisms have been made of the rule of reason: first, that it was *obiter dictum* because the Standard Oil Company and American Tobacco Company were violative of the Sherman Anti-trust Act under any interpretation. Therefore there was no need of a distinction between reasonable and unreasonable restraints of trade. Secondly, that in basing the rule of reason on common law principles White erred in that the common law only made the distinction between reasonable and unreasonable restraints of trade in the matter of contracts that were ancillary to a main contract of sale and reasonably adapted and limited to the contract's lawful purpose. The charge that the "rule of reason" concept does not comport with the common law is well answered by quotations from Justice Stone and from Justice Holmes.

Justice, later Chief Justice, Harlan F. Stone, said:

"In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints.

"That such is the scope and effect of the Sherman Act was first judicially recognized and expounded in the classic opinion in *United States v. Addyston Pipe & Steel Co.* (CCA 6th) 85 F 271, affirmed in 175 U. S. 211, written by Judge, later Chief Justice Taft, and concurred in by Justice Harlan and Judge, later Justice Lurton of this court. This court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for constitutional reasons, are confined to transactions in or which affect interstate commerce.

"In *Standard Oil Co. v. United States*, 221 U. S. 1, 54, 55, 58, decided in 1911, this court, speaking through Chief Justice White, pointed out that the restraint of trade contemplated by section 1 of the Act took its

origin from the common law, and that the Sherman Act was adapted to the prevention, in modern conditions, of conduct or dealing effecting the wrong, at which the common law doctrine was aimed. This, it was said, is 'the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations . . .'. The court declared, page 59, that 'the statute was drawn in the light of the existing practical conception of the law of restraint of trade,' and drew the conclusion that the restraints which were condemned by the statute are those which, following the common law analogy are 'unreasonable or undue.' This view was followed and more explicitly stated in *United States v. American Tobacco Co.*, 221 U. S. 106, 169, where it was said: ' . . . it was held in the *Standard Oil Co.* Case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Antitrust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance.' In thus grounding the 'rule of reason' upon the analogy of the common law doctrines applicable to illegal restraints of trade the court gave a content and meaning to the statute in harmony with its history and plainly indicated by its legislative purpose."<sup>36</sup>

Justice Holmes said in one of his letters to Mr. Wu, "In *Nash v. United States*, 229 U. S. 373, 376, 377, a man was indicted under the Sherman Antitrust Act for a conspiracy in restraint of trade and to monopolize trade. It was objected that as a criminal statute the law was bad, because it had been construed to prohibit only such contracts and combinations as *unduly* restricted competition or *unduly* obstructed the course of trade, and so construed it was too indefinite for a criminal law. But in the opinion I pointed out, p. 377, that 'the law is full of instances where a man's fate depends on his estimating right, that is, as the jury subsequently estimates it, some matter of degree,' that an act might be murder, manslaughter or misadventure according to the degree of danger attending it according to common experience in the circumstances known to the actor. As I put it in a later case . . . 'The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe.'"<sup>37</sup>



That White's construction of the Sherman Act was beneficial is generally conceded by his critics. Professor Dishman in his article on "Mr. Justice White and the Rule of Reason,"<sup>38</sup> although rejecting the common law historical basis of the rule of reason, states: "This is not to say, as some critics have said, that the rule has seriously hampered the Department of Justice in enforcing the antitrust law. We have it on the authority of Thurman Arnold that without the rule the Sherman Act would have been unworkable because every combination between two men in business is in some measure a restraint of trade. The rule, he has said, has the effect of preventing the antitrust law from destroying the efficiency of those combinations which are actually serving, instead of exploiting, the consumer."<sup>39</sup>

There is not space to discuss White's contribution to other fields of law. However, someone is bound to raise the question, where did White stand on the great social issues of his day? Was he a liberal?—like Holmes? It is impossible to squeeze the massive White into a pigeonhole however labelled. There is always a demand to put Supreme Court Judges into categories. It eliminates the need to examine what they decided or to read what they said—we know all about them from the label.

First and foremost White was a lawyer. To him the law was a discipline in the academic sense with its own goals and methodology. When he decided cases before him, he decided them according to legal standards, that is, the law he found in the constitution, the statutes and the case precedents, with a permissible leeway allowed judges, as it is expressed by Cardozo, "as new problems arise, equity and justice will direct the mind to solutions which will be found, when they are scrutinized, to be consistent with symmetry and order or even to be a starting point of a symmetry and order theretofore unknown."<sup>39a</sup> That White had a classical notion of "facts" as well as law is shown by his remark to counsel during the oral arguments of *Stettler v. O'Hara*,<sup>40</sup> "Mr. Frankfurter, I could gather twice as much material to show that private property is wrong and should be abolished,"<sup>41</sup> manifesting a reluctance to regard sociological data gathered upon a hypothesis as the equivalent of evidence emerging from direct and cross-examination.

His *rule of reason* in the antitrust cases and his persistent interest in the new field of administrative law—defined by Dean Pound as "that branch of modern law under which the executive department of government . . . interferes with the conduct of the individual for the purpose of promoting the well-being of the community . . ."<sup>42</sup> is evidence that White had a feeling for the unity of society.<sup>43</sup> Freedom is seen by him as not freedom from the obligations of association with

others but as freedom to associate. Judge Hershey of the Illinois Supreme Court expressed the same idea when he regarded the criminal law as if it was the expression of the minimal social duty exacted of the individual by the government.<sup>44</sup>

White sensed that the danger to be avoided in social reform was that it might destroy society by fragmenting it. He knew society only existed by reason of people combining together formally and informally in countless ways. The search for a balance—the compromise that would leave men free to associate and yet guide their associating so that it would serve the well-being of the community—may explain his dissent in the *Trans-Missouri Freight Association* case where White said "the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which working men seek to peaceably better their condition." It may explain his adherence to the majority in the *Coppage*<sup>45</sup> and *Adair* cases<sup>46</sup> which struck down legislation forbidding employers to discriminate against a workman because he belonged to a union if his action is judged wrong in these instances.

During White's time in the court, with White voting with the majority, the following legislation was upheld:

A state law limiting the hours of work in mines;<sup>47</sup>

A state law limiting the hours of work for women;<sup>48</sup>

The Illinois Child Labor law;<sup>49</sup>

State workmen's compensation laws;<sup>50</sup>

A state law setting up safety regulations for coal mines;<sup>51</sup>

A state law requiring that script used to pay miners be redeemed in cash;<sup>52</sup>

A state law requiring that coal be weighed before it was screened in computing the wages of miners;<sup>53</sup>

A state law forbidding contracts to limit the liability of an employer for injuries sustained by his workmen;<sup>54</sup>

A state law prohibiting pool rooms;<sup>55</sup>

A state law requiring that private employment agencies be licensed<sup>56</sup> was upheld but one abolishing private employment agencies was overthrown;<sup>57</sup>

The Federal Employers Liability Act was upheld;<sup>58</sup>

The Adamson Act limiting hours of railroad workers and for the duration of a specific emergency fixing their wages was upheld;<sup>59</sup>

The state right to fix intra state rates was upheld;<sup>60</sup>

The grandfather's test of eligibility for voting was held bad;<sup>61</sup>

A city ordinance forbidding negroes to live in a particular area if more than half the householders were white was held invalid;<sup>62</sup>

The power of a congressional committee to punish for contempt was limited;<sup>63</sup>



However, an act of Congress forbidding the interstate transportation of goods manufactured by child labor was held unconstitutional,<sup>64</sup> and White silently dissented in the case upholding war time rent control during World War I.<sup>65</sup>

White's last judicial act was his dissent in the *Newberry Case*.<sup>66</sup> There White insisted, against the majority, that the Federal Government did have jurisdiction over primary contests.

In conclusion, I think to understand the greatness of White, we have to see it apart from the subject matter of his decisions. He is a great man because he typifies the Judge in society. You recall the famous controversy between Sir Edward Coke and James the First.<sup>67</sup> James the First had given judgment in a case that arose concerning the ownership of land. Coke, on behalf of the court, set the King's judgment aside. Then the King said that he thought the law was founded upon reason and that he and others had reason as well as judges, to which it was answered by Coke, as he reports it, that no doubt His Majesty had great endowments of nature but His Majesty was not learned in the laws of his realm and cases are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience. At another time, Coke remarked that the law was "an artificial perfection of reason gotten by long study, observation and experience and not of every man's natural reason; for *nemo nascitur artifex*."<sup>68</sup> This might be translated "No one is a born Judge."

White is the type of the professional judge. This is shown by his expertness in procedure. In a sense procedure is the beginning of competence in the art of being a lawyer or a judge, because procedural law is the means by which litigants obtain the benefits of other laws. When White went on the Supreme Court a great number of cases involving questions of procedure were turned over to him. The same thing is true of his service on the state court. This is unusual. Ordinarily, questions of procedure and jurisdiction are decided by the chief justice of an appellate court or are assigned by him to one of the senior associates. It is one of the noteworthy things of White's judicial service that 54 of the 80 cases decided by him on the Louisiana Supreme Court were concerned with procedure, and about one-third of all the cases decided by White in the United States Supreme Court were concerned with procedural questions.<sup>69</sup>

From the lawyer's standpoint procedure is the adventure of the law, and from a judge's standpoint, procedure pertains to the due process according to which he decides controversies. In the field of administrative law, for example, reviewing courts insist that administrative agencies act consistently with

their own procedures. To a degree, the acceptance of the belief that procedure is of little importance is a yielding on the ideal of government by law and not by personalities.

James the First was not the last legal primitive. The simplistic notion of law is the cause of a great deal of misunderstanding, and of unfair criticism of the courts. When Chief Justice Oliver Ellsworth was a young man in New England it was expressed as follows: The common law was only "adapted to a people grown old in the habits of vice" while the law which the courts of Connecticut administered "was derived from the law of nature and of revelation."<sup>70</sup> The voice of this tradition is sometimes heard today in criticisms of decisions of the Supreme Court.

The law is the dividing of the big truths which, to quote Arthur Miller, "define humanity and the right way to live, so that the world is a home and not a battlefield, or a fog in which disembodied spirits pass each other without recognition"<sup>71</sup> into the little truths by which everyday life may be regulated. What the law is trying to do in the field of action is a little like Morris Cohen's search for concepts with a smaller twilight zone in the field of reasoning.<sup>72</sup> This is not done in any free hand style. White's opinions, like the judgments and opinions of other competent judges, are a painstaking practice of an ancient art according to its own tested methods.

White's opinions are also an answer to the sophistates, who would require such certainty of legal definition that the law would be straight jacketed and alike unable to serve the community, or do justice between individuals.

By honoring White our faith and pride in our tradition of justice by means of the law is renewed. We may hold our heads a little higher because Edward Douglass White lived.

#### FOOTNOTES

<sup>1</sup> Klinkhamer, O.P., Sister Marie Carolyn, *Edward Douglass White, Chief Justice of the United States*, Catholic University of America Press, 1943. This scholarly work is not only a biography of White, but it contains a discussion of his opinions classified according to general subject matter.

<sup>2</sup> Paul A. Freund, "Mr. Justice Brandeis," in *Mr. Justice*, University of Chicago Press, 1956, p. 106.

<sup>3</sup> Howe, Mark De Wolfe, *Holmes-Laski Letters*, Nov. 26, 1920, p. 294, Vol. I, Harvard University Press, 1953, p. 294.

<sup>4</sup> Umbreit, Kenneth Bernard, *Our Eleven Chief Justices*, p. 366.

<sup>5</sup> Proceedings in Memory of Edward Douglass White, 275 U. S. XXVII.

<sup>6</sup> January, 1879, to March, 1880, 31 and 32 *Louisiana Reports*.

<sup>7</sup> Proceedings in Memory of Edward Douglass White, 257 U. S. XV (1922), 153 to 256 U. S. Reports.

<sup>8</sup> Proceedings in Memory of Edward Douglass White, 257 U. S. XXVII.

<sup>9</sup> 224 U. S. (1912) 1, 49, 51.

<sup>10</sup> Umbreit, cited to Note 4 above, p. 369.



- <sup>10</sup> Klinkhamer, cited in Note 1 above, p. 44.
- <sup>11</sup> Klinkhamer, cited in Note 1 above, p. 59.
- <sup>12</sup> Sept. 24, 1910, *Holmes-Pollock Letters*, p. 169, Vol. I.
- <sup>13</sup> Klinkhamer, cited in Note 1 above, p. 54.
- <sup>14</sup> Quoted in Morison and Commager, *The Growth of the American Republic*, New York, 1950, p. 115.
- <sup>15</sup> Constitution of 1870, Article XI, Section 15.
- <sup>16</sup> 94 U. S. 113 (1876).
- <sup>17</sup> *Peik v. Chicago & Northwestern R. R. Co.*, 94 U. S. 164 (1876); *Chicago, Burlington & Quincy R. R. v. Iowa*, 94 U. S. 155; *Winona & St. Peter R. R. v. Blake*, 94 U. S. 180; cited in Morison and Commager, cited in Note 14 above.
- <sup>18</sup> *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. (1886) 557.
- <sup>19</sup> *Chicago, Milwaukee & St. Paul R. R. v. Minnesota*, 134 (1890) U. S. 418.
- <sup>20</sup> 204 U. S. (1907) 426, 430.
- <sup>21</sup> *Elgin & J. E. R. Co. v. Burley*, 325 U. S. (1945) 711, 759.
- <sup>22</sup> 214 U. S. (1909) 320, 338.
- <sup>23</sup> Compare: Frankfurter "One of the greatest duties of a judge, the duty not to enlarge his authority." Quoted by Brown, Ernest J. "Justice Frankfurter, and the Position of the Judiciary" 67 *Yale Law Journal* 221.
- <sup>24</sup> 181 U. S. 1 (1901) 24, 27.
- <sup>25</sup> *Interstate Commerce Commission v. C. B. & Q. R. R. Co.*, 186 U. S. (1902) 320, 341, 342.
- <sup>26</sup> 252 U. S. (1920) 178, 187, 188.
- <sup>27</sup> 165 U. S. (1897) 675, 714.
- <sup>28</sup> *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. (1910) 452, 470.
- <sup>29</sup> Klinkhamer, cited Note 1 above, p. 48.
- <sup>30</sup> *Holmes-Laski Letters*, Note 3 above, p. 294.
- <sup>31</sup> Proceedings in Memory of Edward Douglass White, 257 U. S. XXV.
- <sup>32</sup> 166 U. S. (1897) 290, 351.
- <sup>33</sup> *United States v. Addyston Pipe & Steel Co.* (CCA 6th) 85 F. (1898) 271, Aff'd. 175 U. S. (1899) 211.
- <sup>33a</sup> *Northern Securities Co. v. United States*, 193 U. S. (1904) 197.
- <sup>34</sup> 221 U. S. (1911) 1, 30.
- <sup>35</sup> 221 U. S. (1911) 106, 142. The gradual development of the rule of reason from its first statement by White in his dissent in the *Trans-Missouri Freight Case* is discussed by William Howard Taft, *The Antitrust Act and the Supreme Court*, Harper & Bros., 1914, p. 72, 86. Taft's contribution by his opinion in the *Addyston Pipe Case* is important. Justice Brewer, in a separate concurring opinion in the *Northern Securities Case*, added the point that the terms of the statute, being words having common law significance, are to be interpreted in the light of their meaning at common law. With Brewer adopting the rule of reason, Holmes said in his dissenting opinion, "I am happy to know that only a minority of my brethren adopt an interpretation of the law (Sherman Act) which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms."
- <sup>36</sup> *Apex Hosiery Co. v. Leader*, 310 U. S. (1940) 469, 497-500.
- <sup>37</sup> Letter to Mr. Wu dated December 2, 1922, Shriver, *Justice Oliver Wendell Holmes, His Book Notices and Uncollected Letters and Papers*, New York, 1936.
- <sup>38</sup> 13 *Review of Politics*, 229.
- <sup>39</sup> A footnote in *Nashville Milk Co. v. Carnation Co.*, 355 U. S. (1958) 373, 377, Note 4, states that a total of 71 statutes are set forth in a compilation entitled *Antitrust Laws with Amendments, 1890-1951*, indicating the legislative development in this field.
- <sup>39a</sup> Quoted in Wu, cited in Note 67 below, p. 266.
- <sup>40</sup> 243 U. S. (1917) 629.
- <sup>41</sup> Quoted in Mason, Alpheus T., *Brandeis: Lawyer and Judge in the Modern State*, Princeton University Press, 1933.
- <sup>42</sup> Roscoe Pound, "Constitutional Aspect of Administrative Law," 9 *American Bar Association Journal*, 513, quoted in Klinkhamer, cited Note 1 above, p. 70.
- <sup>43</sup> Compare: Nisbet, *The Quest for Community*, p. 227. Free society, according to the social reformers of the 18th and 19th Centuries would be composed of socially and morally separated individuals.
- <sup>44</sup> *People v. Shields*, 6 Ill. 2d 200, 206.
- <sup>45</sup> *Coppage v. Kansas*, 236 (1914) U. S. 1.
- <sup>46</sup> *Adair v. United States*, 208, U. S. (1908) 161.
- <sup>47</sup> *Holden v. Hardy*, 169 U. S. (1898) 366, 380. For a discussion of Supreme Court Cases having to do with social issues, see Rodes, "Due Process and Social Legislation in the Supreme Court—A Post Mortem," 33 *Notre Dame Lawyer* 5.
- <sup>48</sup> *Muller v. Oregon*, 208 U. S. (1908) 412, 416.
- <sup>49</sup> *Sturges & Burns Mfg. Co. v. Beauchamp*, 231 U. S. (1913) 320.
- <sup>50</sup> *New York Central R. R. Co. v. White*, 243 U. S. (1917) 188; *Hawkins v. Bleakley*, 243 U. S. (1917) 210; *New York Central v. Bianc*, 250 U. S. (1919) 596. In another case, *Mountain Timber Co. v. Washington*, 243 U. S. (1917) 219, a type of workmen's compensation law requiring compulsory, monopolistic, state fund insurance was approved, but there were 4 dissenters, including White. In the *Arizona Employers' Liability Case*, 250 (1919) U. S. 400, White was a silent dissenter. Cited in Rodes, Note 47 above.
- <sup>51</sup> *Barrett v. Indiana*, 229 U. S. (1913) 26.
- <sup>52</sup> *Knoxville Iron Co. v. Harbison*, 183 U. S. (1901) 13.
- <sup>53</sup> *McLean v. Arkansas*, 211 U. S. (1909) 539.
- <sup>54</sup> *C. B. & Q. Ry. v. McGuire*, 219 U. S. (1911) 549.
- <sup>55</sup> *Murphy v. California*, 225 U. S. (1912) 623.
- <sup>56</sup> *Brazee v. Michigan*, 241 U. S. (1916) 340.
- <sup>57</sup> *Adams v. Tanner*, 244 U. S. (1917) 590.
- <sup>58</sup> *Second Employers Liability Cases*, 223 (1912) U. S. 1. White wrote the opinion invalidating the first enactment in this field, 207 U. S. (1908) 463.
- <sup>59</sup> *Wilson v. New*, 243 U. S. (1917) 332.
- <sup>60</sup> *Minnesota Rate Cases*, 230 U. S. (1913) 352.
- <sup>61</sup> *Gunn v. United States*, 238 U. S. (1915) 347.
- <sup>62</sup> *Buchanan v. Warley*, 245 U. S. (1917) 60.
- <sup>63</sup> *Marshall v. Gordon*, 243 U. S. (1917) 521.
- <sup>64</sup> *Hammer v. Dagenhart*, 247 U. S. (1918) 251.
- <sup>65</sup> *Block v. Hirsch*, 256 U. S. (1921), also *Marcus Brown Co. v. Feldman*, 256 U. S. 170 (1921) 135.
- <sup>66</sup> *Newberry v. United States*, 256 U. S. (1921) 232.
- <sup>67</sup> Retold in Wu, *Fountain of Justice*, New York, 1955, p. 92, citing *Prohibitions Del Roy*, 12 Co. Rep. 63 (K. B. 1612).
- <sup>68</sup> Quoted in Wu, cited above, Note 67, p. 30.
- <sup>69</sup> Klinkhamer, cited above Note 1, p. 108.
- <sup>70</sup> Umbreit, cited above Note 4, p. 88. This is not a criticism of the tradition of natural law which offers reasonableness, rather than force, as the sanction of law. Natural law answers more the question "why is something law?" rather than "what is law?" Since it lacks particularity and certainty it cannot be a substitute for a system of positive law anymore than the precept "love thy neighbor" can do away with the need for the many customs, habits and actions which might assist one in being a good neighbor. See D'Entrèves, A. P., *Natural Law*, Hutchinson House, London, 1951, p. 118. (This is a printing of a series of lectures given at the University of Chicago in 1948).
- <sup>71</sup> Miller, Arthur, *Collected Plays*, New York, 1957, p. 32.
- <sup>72</sup> Cohen, Morris R., *A Preface to Logic*, Meridian Books, New York, 1956, p. 92.





R. H. Maudsley

### *Visiting Professor*

The School is pleased to announce the appointment of Mr. R. H. Maudsley, of Brasenose College, Oxford, as a Visiting Professor in 1959.

Mr. Maudsley, after first class honors at Birmingham University, and six years of war service received the B.C.L. with first class honors at Oxford University. He was then appointed a Fellow of Brasenose College, and has held that position continually to date. He will be at the Law School from February, 1959, until the end of the Summer Quarter of that year.

*Meltzer—*

*Continued from page 3*

union and non-union, in the unit. (This duty, incidentally, is not easy to enforce in the absence of blatant forms of discrimination such as that based on race.)

Although the statutory scheme involves a limitation on the freedom of a dissenting minority, this limitation seems justifiable on two grounds: First, it is necessary for orderly collective bargaining, which has important values. Secondly, the requirement that the bargaining agent have the support of the uncoerced majority makes his authority consistent with the generally accepted principle that the government of

political or private groups should depend on the consent by a majority of those governed.

There are those who would repudiate the requirement of majority support on the ground that a union, at least if it represents a substantial segment of an industry, is automatically entitled to the worker's allegiance and support. I find this argument unacceptable for several reasons: First it ignores the fact that the value of collective bargaining both to the enterprise and to the employees depends on consent, by the employees affected, to the bargaining agent's role and to the agreement he has negotiated. Majority support, although it is not sufficient, is generally necessary, for such consent. For the purpose of determining the existence of such support, the "industry" is an abstraction far removed from the employee's interest, which is generally centered in the plant or the enterprise which employs him. Accordingly, the plant or the enterprise and not the industry appears in general to be the largest unit which can be appropriately used in determining whether the necessary majority support exists. Secondly, the use of the smallest possible unit, consistent with orderly and stable collective bargaining, will minimize the need for subordinating the preferences of large and concentrated minorities to the requirements of majority rule. Minimizing the coercion of such minorities is still an important value in our society, despite the expansion of institutional arrangements which promote the subordination of the interests of individuals and minorities to those of larger groups. For these reasons, I believe that the architects of the federal policy were wise in rejecting the notion that unions, like the state, are entitled to any automatic allegiance.

When we move from the statute to the real world, we are confronted with familiar and controversial union organizing techniques which appear inconsistent with the basic philosophy of both the Wagner Act and the Taft-Hartley Act. I refer, of course, to recognition picketing and to its close relative, if not its transparently disguised twin, organizational picketing.

An appraisal of such picketing requires a judgment about the underlying purpose or purposes involved. This judgment is, in turn, complicated because such purposes may vary with the individual situation. Nevertheless, the following generalized and familiar description seems reasonably valid:

Picketing is an attempt to isolate the employer from his suppliers, his customers, and his employees. Although it involves communication, its primary significance is not as argument appealing to reason but as an instrument of economic pressure. The severity of that pressure will vary from case to case. It will depend on the allies of the picketing union, the sympathies of the employer's employees, the sentiments and fears of his customers, the location of his premises,



and a host of other factors. But one aspect of picketing is relatively constant; it is designed to exert the maximum economic pressure on the employer and, directly or indirectly, on his employees.

Where a union which lacks majority support pickets for immediate recognition, and the Taft-Hartley Act or similar state legislation is applicable, it is almost certain that the picketing is designed (1) to cause the employer to violate the statute by recognizing the union despite its lack of majority support; (2) to force the employer to coerce the neutral or anti-union employees to join the union, again in violation of the statute; and (3) to force the employees to join to avoid the obvious danger to their jobs or earnings resulting from the losses suffered by the enterprise. The picketing may, as we will see later, also have other objectives, but such objectives supplement, rather than supersede, those just described.

When the union placard reads "join us" and the union urges that it is only organizing and that it doesn't want recognition until it has "persuaded" a majority of the employees, is the situation any different? Since organizational picketing inflicts the same kind of economic damage as recognition picketing, the pressure on the employer to disregard, or to coerce his employees' preferences, is the same, and the pressure on his employees to surrender their preferences for their jobs, is also the same. There may, of course, be skepticism about the union's disclaimer of any interest in immediate recognition in view of the trouble, the expense, and the commitment of union prestige which is involved in maintaining a picket line.

Even if the union's disclaimer is accepted at face value, two disturbing considerations remain: First, the coercive aspects of such picketing necessarily involve a threat to the employees' free choice; secondly, alternative and non-coercive organizational devices exist and are protected by the federal statute although there is naturally controversy as to both the content and the administration of the statute. Under the foregoing circumstances, does the union's future interest in recognition justify the threat to free choice and the economic loss which organizational picketing presently entails?

There are four principal arguments in support of such picketing, arguments which I do not find persuasive, either singly or in combination, where union-organization enjoys the protection of the Taft-Hartley Act or similar protection under state statutes.

(1) The first argument, that peaceful organizational picketing has the constitutional protection of free speech, has been outmoded by a sensible shift in doctrine by the Supreme Court. The *Vogt* case, decided last term, held that where there is a reasonable basis for concluding that picketing was designed to coerce

the employer into interfering with free choice by the employees, a state injunction against such picketing is consistent with the protection of free speech embodied in the Fourteenth Amendment. The *Vogt* case thus appears to dispose of the question undecided in the *Gazzam* case, namely, whether, for free speech purposes, organizational picketing should receive more protection than recognition picketing.

(2) The second argument is that non-union employees, if they get less than unionized employees, are undermining union standards, and if they get as much or more, benefit from union activities but are free riders. I find that both aspects of this argument unpersuasive. If the employees get less, they ought to be ripe for non-coercive organization. If they get as much or more, it does not follow that they are free-riders. The forces which govern wage determination are too complex to warrant that easy assumption. In many situations, a forceful argument can be made that organization has not raised wages in the organized, let alone, the unorganized area. But whatever the truth here, the acceptance of so expansive a free-rider concept would flatly repudiate the desirable principle that uncoerced majority support in an appropriate unit is a condition of recognition.

The third argument has been recently advanced by Professor Cox of the Harvard Law School. In essence it is that the primary significance of picketing is not as economic coercion but as a demonstration of union power which offsets the unorganized employees fear of running counter to his employer's wishes. Accordingly, Professor Cox concludes, a vote after picketing may be a more reliable poll than a vote without competing pressures. Professor Cox suggests, however, that a union which has lost a Board-conducted election should not be privileged to continue organizational picketing.

I find this reasoning subject to three principal difficulties. First, an employer, who is being squeezed by picketing, may not defer recognition until an election. His early surrender may, for practical purposes, foreclose any test by the ballot rather than make such test more reliable. Secondly, the pressure on employees which organizational (or recognition) picketing necessarily involves cannot, in the nature of things, be nicely adjusted so as just to offset the employees' fear of their employer. Picketing pressure may in fact be so strong as to destroy employee free choice. In any event, pressure on employees as a means of protecting their free choice seems anomalous to me. It's like saying that a fellow applying for a job as your bodyguard is privileged to show his muscle by cracking you on the jaw.

Secondly, the picture of the cowed and fearful employee may be overdrawn for many industries and for many regions in the United States, now that the



statutory protections, including secret elections, are over 20 years old and are, presumably, increasingly familiar. Indeed, if we accept the full implications of the image of the fearful employee, it is not easy to see why the picketing should end with an election which the union loses. It could be argued that a reliable poll may require continuous picketing until next election, to offset employees' fears of their employer, which presumably have been increased by the union weakness reflected in a losing election.

The third and most important difficulty with Professor Cox's position involves his unspoken appraisal of the four sets of competing interests involved. First, there is the interest in organization on the part of those employees who remain fearful despite comprehensive statutory protections, including a secret ballot. Secondly, there is the interest of the unionized sector in expanding its influence, an interest which, however, is not entitled to much weight under a statute stressing uncoerced majority support in an appropriate unit. Thirdly, there is the opposing interest of those employees who are not afraid to exercise their statutory rights. Finally, there is the interest of the lawful employer. Professor Cox assumes, without telling us why, that the interest of the fearful employees and of the union in organization should prevail over the two other competing interests. I find this value judgment highly dubious.

The final argument for organizational-recognition picketing is related to the argument advanced by Professor Cox. It emphasizes that many employers do not obey the law, and that, they are often able to nullify employee free choice by unfair labor practices which cannot be proved or which even if proved and ultimately remedied by the Board nevertheless succeed in frustrating legitimate organizational attempts.

It is, I believe, fair to assume that most unorganized employers want to stay that way. Furthermore, the inherent limitations of the law, as well as bad administration, permit some employers, by unlawful coercion, to deny to unions the bargaining status which they would have otherwise achieved. But these considerations, troublesome as they are, do not warrant the indiscriminate use of coercive picketing against lawful as well as lawless employers and their employees. The law attempts to surround non-coercive organizational efforts with comprehensive protection. Although the law in this area, as in other important areas, is necessarily imperfect, such imperfections do not justify coercive self-help. We would give short shrift to an employer who sought to justify reprisals against innocent employees on the ground that some employees acting for a union had used tactics which were coercive but which could not be proved to be so. It is not clear to me why an essentially similar argument invoked to support coercive

picketing is more persuasive. Coercive self-help to rectify the inherent limitations of the law is a doubtful and dangerous expedient. The acceptance of such limitations, until the law is changed, is plainly one of the conditions of an orderly society.

The acceptance of such imperfections is, I believe, also necessary for orderly and stable collective bargaining. The adjustments required when a plant is first organized are especially difficult for all concerned. The difficulties are increased when the union lacks majority support as it often will if an employer grants recognition merely because he wants to be rid of picketing, "organizational" or recognition. In opposing the closed shop, Samuel Gompers and Louis Brandeis among other friends of the union movement, warned that a healthy labor movement and stable relationships within a plant could be jeopardized by union compulsion. These warnings are, I believe, relevant here.

The recent disclosures by the McClellan Committee point to additional dangers. Coercive picketing, actual or threatened, has been the weapon of the shake-down artist, who will forego organization for the right price. Such tactics, unfortunately but inevitably, endanger the good name and the legally recognized privileges of decent as well as corrupt union leadership. Organization from the top by the employer also invites the sweetheart contract by which unscrupulous employers and so-called union leaders sell the men out under soft contracts which, however, often include the union-shop and check-off provisions.

Although Section 302 of the Taft-Hartley Act makes it illegal for employers to make, and union officials to receive, certain payments, that Section is probably not applicable to pay-offs designed to forestall organization. The sweetheart contract made with a union lacking majority support may be nullified by the Board. But in the absence of a rival union, recourse to the law is discouraged by the union-employer solid front. In any event, these perversions of picketing and collective bargaining will be facilitated so long as employers are subject to the threat of organizational or recognition picketing and the law and unions sanction its use.

What I have said so far suggests that recognition picketing is incompatible with the basic and desirable principle of free choice embodied in our national labor policy and should not be lawful. It suggests also that organizational picketing, although somewhat more defensible, involves substantially similar difficulties. Furthermore, any difference between the two forms of picketing is essentially verbal and is too tenuous a basis for different legal treatment. Accordingly, my suggestion is that both forms of picketing by a union which lacks majority support and which enjoys the

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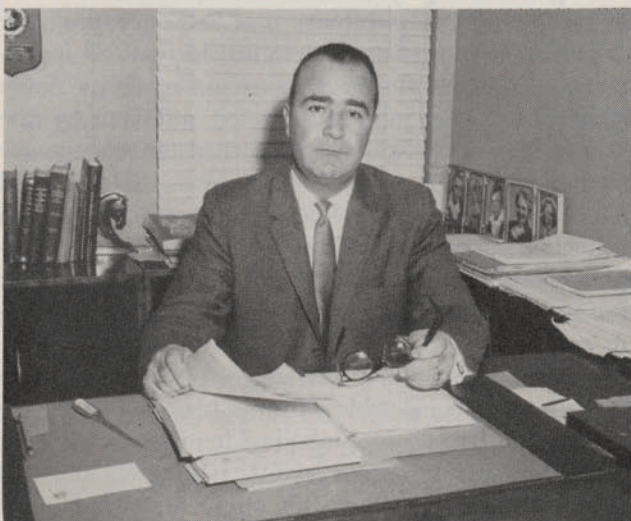
## *Law School Alumni in Salt Lake City*



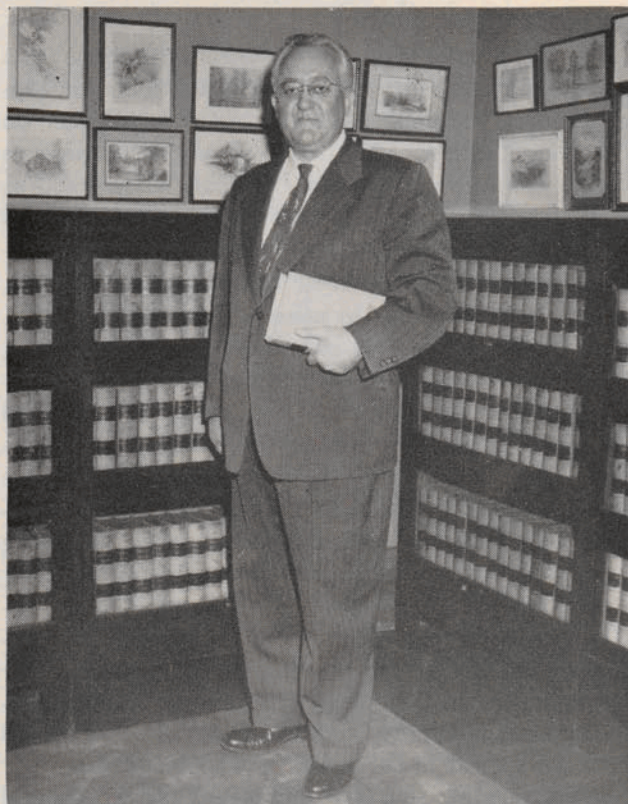
Stephen L. Richards, LLB'04, is a member of the Council of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints, and is a President of the Church. He has served the Church extensively in many capacities, as he has served the Bar, for a time as a Vice-President of the American Bar Association. He is currently an officer or director of some dozen business organizations.



Joseph S. Jones, JD'30, a member of Ray, Rawlins, Jones and Henderson. His practice is principally in the public utility, banking and corporate fields; he is active in a wide variety of civic affairs.



Grant C. Aadnesen, JD'42, a partner in Ray, Quinney and Nebeker, and past president of the Salt Lake County Bar Association.

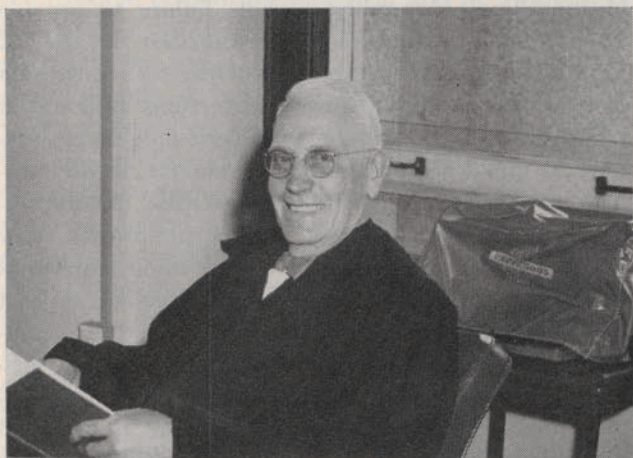


The Honorable Willis W. Ritter, JD'24, U. S. District Judge for the District of Utah. Judge Ritter had practiced law in Illinois, the District of Columbia and Utah before his appointment to the Bench. He was also, for twenty-five years, Professor of Law at the University of Utah.





Henry D. Moyle, JD'15, was widely active in the practice of law and in the oil and livestock business until 1947. In that year, he became a member of the Council of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints. Since 1936, he has also been Chairman of the General Committee of the Church Welfare Program. He now devotes all of his time to these two enterprises.



The Honorable Lester A. Wade, JD'17, Justice of the Supreme Court of Utah. He practiced law in Utah and in Idaho, and served for ten years as a District Judge in Utah before his appointment to the Supreme Court.



David A. Skeen, JD'10, is senior partner of Skeen, Worsley, Snow and Christensen. He was a founder, and for thirty-six years president of, the Utah Legal Aid Society; he is currently active in the work of the National Legal Aid Association. Mr. Skeen has also been a member of the House of Delegates of the American Bar Association. He served a term as President of the International Association of Lions Clubs. He was a consultant to the United States Delegation to the United Nations Conference in San Francisco and a special delegate to the Paris Peace Conference in 1946.



Raymond W. Gee, JD'54, is Assistant Attorney General of Utah, and is widely active in Bar, Church and political affairs.



Meltzer—

*Continued from page 47*

basic protections granted by the Taft-Hartley Act should be unlawful.

The basic analysis which I have submitted was accepted, in part, by the NLRB in the recent *Curtis Brothers* decision. In that case the Board, rejecting earlier precedents, held that "recognition picketing" by a union immediately after it had lost an election was a violation of the Taft-Hartley Act. I lack the time for an extended analysis of the decision but you may be interested in the following high points: (1) Four members of the five man Board looked beyond the union placards to determine whether the picketing involved was to be treated as recognition picketing. (2) Three members of the Board indicated that the decision would be extended to minority picketing for recognition and, indeed, to any other technique, such as unfair lists or the instigation of consumer's boycotts, which interferes with the employees' free choice, regardless of whether an election had taken place. These three, however, reserved judgment on organizational picketing. (3) A concurring member (Jenkins) declared that the decision was confined to the situation where recognition picketing continued after the union had lost an election. (4) Member Murdock, dissenting, urged that neither recognition nor organizational picketing before or after an election should be declared unlawful but went on to say that recognition and organizational picketing are indistinguishable.

Before the *Curtis* decision, Secretary Mitchell had indicated that he would recommend federal legislation prohibiting recognition picketing but not organizational picketing. If the Board pushes the *Curtis* reasoning to its logical conclusion and proscribes organizational picketing the Secretary may be somewhat embarrassed. He may be forced either to abandon his essentially verbal distinction or to press for legislation which would enlarge, rather than narrow, legally permissible picketing.

On the state level, the problem is dominated for the present by the interplay of the Supreme Court's pre-emption doctrine and the NLRB's refusal, for budgetary and other reasons, fully to exercise its statutory jurisdiction. Under the Court's doctrine, the states, by virtue of the Taft-Hartley Act, may not enjoin peaceful picketing or other non-violent union techniques directed at an enterprise which is subject to the Board's statutory jurisdiction, i. e. an enterprise which "affects" interstate commerce. But the Board will not take jurisdiction over all such enterprises; it will in general exercise its jurisdiction only where the enterprise meets certain tests of size, which are rough measures of a substantial effect on interstate com-

merce. Nevertheless, the existence of statutory jurisdiction by the Board, even though it is not exercised, precludes the states from restraining peaceful picketing. The net result is one which makes a lawyer speaking to laymen somewhat uncomfortable. Peaceful picketing, which falls within the Board's theoretical but unexercised jurisdiction can not be directly restrained even though state and federal law each separately recognizes that injunctive relief would be appropriate.

Plainly, this no-man's land requires action, which could take one of two forms: (1) The Board could expand the area in which it actually exercised its statutory jurisdiction. Chairman Leedom has indicated that the Board will take such action, the resulting increase in the General Counsel's and the Board's work-load would presumably require increased appropriations by Congress. (2) Congress by legislation could modify the preemption doctrine so as to revive state authority, at least in the area where the national Board refuses to act.

Pending such a modification of the preemption doctrine state law can furnish injunctive relief against peaceful picketing only to an ill-defined and narrow category of businesses, those which do not "affect" interstate commerce.

I do not mean to imply that the narrow scope for state action is an argument against state legislation. Quite to the contrary; the small enterprises which may be found by the courts not to "affect commerce," and their employees are particularly vulnerable to picketing pressures and are particularly in need of legislative protection.

On the other hand, smaller employers probably find it easier to get away with discriminatory reprisals against employees for union activity. The principal deficiency, and in my view, the decisive deficiency, of H. B. 702, which was defeated in the last session of the Illinois Assembly, was its failure to provide for protection against such discrimination. H. B. 702 prohibited minority picketing whether for recognition or organization. It provided for elections, although it failed to lay down criteria to govern unit determination. It failed also to indicate whether such determinations were to be judicially reviewable. But its fundamental defect was its failure to provide any protection against discharges of pro-union employees or against other employer conduct which is at least as destructive of employee free choice as the picketing which the Bill would have outlawed. Such protection seems to me to be a necessary part of any anti-picketing legislation. I recognize that this would mean that Illinois would have to face all of the tough problems involved in writing a comprehensive labor act and the expense of administering such legislation. I believe, however, that such legislation, which could



draw on the experience of other states, such as Wisconsin and New York, would be desirable. During the discussion period, I will be glad to explore methods for achieving the maximum possible agreement between labor and management on the content of such an act.

In the time which remains, I want to turn to the controversy about arrangements compelling employees to belong to or to give financial support to unions and about the so-called right-to-work laws which would forbid such arrangements. I say "so-called" because such laws plainly do not give anyone a right to work and because their exponents are generally silent about restrictions on occupational choice unless such restrictions flow from arrangements favored by unions.

The controversy is so often confused by imprecise rhetoric that it may be worth while to differentiate the three principal arrangements involved. First, there is the closed shop, under which the employer may hire and retain in his employ only employees who are, and remain, members of the union involved. Secondly, there is the traditional union shop, which permits the hiring of non-union employees, but which requires them to join the union within a specified period and which also makes continued employment dependent on retention of membership. Finally there is the "Taft-Hartley" union shop. Under that statute, as amended, a union which has majority support in the unit and which has satisfied certain procedural requirements may enter into an agreement requiring all employees involved to pay periodic dues and uniform initiation fees within thirty days after their employment. The statute, however, confers on the states the authority to prohibit even this limited arrangement.

The closed shop plainly confers great powers on the union and imposes corresponding limitations on the freedom of both the employer and his employees, present and prospective. The dependence of employment on union membership prevents management, despite its responsibilities, from hiring those whom it considers most qualified; only union members are eligible. This dependence also restricts the occupational choices of members of the labor force who are denied membership in the union involved or who are unwilling to accept such membership. The closed shop thus empowers the union to determine how many and who shall work in the enterprises involved, which may comprise substantially all of the competitors in an industry or an area. Even the state has refrained from seeking such powers in time of peace, except in special areas such as the public utility field.

The substantial powers conferred by the closed shop can be, and have been, used for purposes which are

incompatible with the generally accepted values of our society. For example, the closed shop can be, and has been, used for private extortion schemes whereby those in control of admissions to the union impose stiff entrance fees on those who want to enter a trade. It can be, and has been, used to implement discrimination based on race, creed, or sex, as well as arrangements for making certain jobs hereditary. It can be, and has been, used to create or to intensify labor shortages, thereby facilitating the exploitation of consumers and of other workers, who are forced into less attractive occupations. These consequences, it is true, presuppose that the closed shop is coupled with the wholly or partially closed union, and this combination has been subjected to judicial limitations in some jurisdictions which generally sanction the closed shop. Such limitations raise the question of whether the evils of the closed shop could be remedied by regulation without curtailing the benefits which it allegedly creates—a question which I will mention again later on.

Although I have referred to the monopoly dangers of the closed shop, I want to note the danger of exaggerating them. The closed shop is probably more significant as a reflection, than as a cause, of union power. Generally, where a union is strong enough to obtain a closed shop over a substantial segment of an industry or over a significant number of competitors in a local market, it is also strong enough to inflate the wage scale without recourse to the closed shop. "Unduly high wages" indirectly result in the restriction of entry into occupations which can be achieved directly by the closed shop. Nevertheless, the direct control over the number of entrants conferred by the closed shop facilitates both the restriction of entry and exaction of high rates on behalf of those permitted by the union to engage in a particular occupation.

Even though such permission has been granted, it can be withdrawn since under a closed shop contract employees expelled from the union forfeit their jobs. As a result, such a contract vests the union with far-reaching control over its members' activities on and off the job. This power may be, and has been, used to discipline not only wildcat-strikers and strike-breakers, but also members who are critical of union policies or of corruption by union officials or who refrain from paying assessments to support union legislative proposals which they personally oppose.

The foregoing criticisms of the closed shop have been met by a defense which rests on the following principal grounds:

(1) The closed shop gives the union needed and desirable security against anti-union attacks by employers, disruptive factionalism within the union's own ranks, and raids by rival unions. As a result, the



union can be more "responsible" both in its demands and in disciplining workers who engage in activities, such as wildcat strikes, which are inconsistent with plant discipline and orderly collective bargaining.

(2) It permits the union to see to it that employees have the skills necessary for the jobs involved.

(3) It makes possible an adjustment of the supply of workers to the "need for them."

(4) Most unions have used their powers "responsibly"; some employers have, indeed, found those powers useful in promoting plant discipline and stability.

I find these arguments unpersuasive as to unions which enjoy the protection conferred by the Taft-Hartley Act or similar protection under state law. Despite the inherent imperfections of such legal protections, they present a substantial obstacle to union-busting techniques on the part of employers and represent, in the main, a reasonable balance between free employee choice and stability for the bargaining representative. To the extent that changes in the details of such protective regulation are required, they should be effected within the general regulatory framework and scarcely justify the closed shop.

Nor is the closed shop necessary to insure either proper skill or discipline on the part of employees. As to discipline, the employer, if he is not unduly restricted by the union, has in most cases the incentive as well as the authority to take appropriate action. And even if an occasional employer should wish help from the union, his desires should not be more controlling than the union's, in view of the other interests involved. Similarly, the employer's self-interest can generally be relied on to insure employees of requisite skill. Where, however, the public interest requires additional control, the appropriate remedy would appear to be regulation by politically responsible authority rather than by private groups. This point is equally applicable to regulation of the supply of particular workers.

Finally, neither experience nor analysis supports the view that "union responsibility" can be relied on to avoid abuse of the broad authority granted by the closed shop. This authority is too closely related to the union's power interests and its drive for maximizing the gains of its members to be kept in check by an amorphous concept of responsibility which, except in a small and ill-defined category of cases, is not backed up by legal sanctions. We have not, in general, relied on "employer responsibility" or the "corporate conscience" to curb business conduct which threatens important interests. There is no reason for being more sanguine about the effectiveness of "union responsibility."

Other students of the problem have been equally distrustful of union self-regulation in an area which

invites exploitation of the public and tyranny over individual employers. But they have urged that regulation rather than prohibition, is the answer. Although I lack the time to argue the point, I believe that such regulation would adequately protect the interests involved only if it in substance denied the powers flowing from the closed shop. It seems to me more efficient to deny such powers directly by proscribing that arrangement. This suggestion is, however, subject to a qualification, which I will develop in a moment.

This traditional union shop does not require union membership as a condition of hire, but does require employees to join the union within a specified period after they are employed, and to retain their membership thereafter. This arrangement theoretically does not limit the employer's right to select his employees and imposes a much gentler restriction on occupational choice. Nevertheless, if the break-in costs for new employees are high, and if it is likely that unions will exercise their expulsion power after entry, employers will be reluctant to hire new employees without union clearance. Under such circumstances, the union shop would be the closed shop by another name.

It seems unlikely, however, that this theoretical danger has been a real one. In the mass production industries, the traditional union shop has apparently not been used to achieve indirect control over the hiring process. And in other industries, there has been little occasion to resort to such indirection since generally, although not always, both the closed shop and the traditional union shop have been legal or illegal.

Even if the danger of indirect control over hiring is dismissed as imaginary, the traditional union shop suffers from the objection that it gives the union far-reaching power over the lives of the employees after they have been employed. This is true because their continued employment is dependent upon their continued membership in the union. Some unions have established internal procedures designed to prevent abuses of this power, and the courts have sought to subject it to a concept of due process. But the possibilities for substantial abuses which remain suggest that the traditional union shop, like the closed shop, should remain illegal—provided that the protections of the Taft-Hartley Act, or similar protections, are in effect.

This proviso is an important one. In the absence of such protection of organizational interests, the employer is privileged to frustrate the employees' free choice by tactics that are a sorry chapter of our history. Under such circumstances, the argument that the arrangements we have examined are necessary for union security are appealing despite the fact that such arrangements may be used to exploit the public and to tyrannize the employees.



There is another qualification of my position concerning the closed and traditional union shop. It enters in particular industries or in any given labor market were evenly divided between open shops and closed shops, I doubt that there would be any case for prohibiting either the closed or union shop. Under such circumstances, the monopoly problem associated with the closed shop would be obviated by competitive pressures from open shops. Workers, moreover, could pick the closed or the open shop according to their individual preferences. The existence of these alternatives and the discipline of competition would justify state abstention from the regulation of the terms of collective bargaining agreements. But this diversity of employment opportunities is not sufficiently wide-spread to make this qualification relevant to current problems of labor policy.

The Taft-Hartley-union shop, unlike the two other arrangements, conditions employment, not on continued union membership, but only on financial support of the bargaining agent. This is a significant difference because it operates to minimize limitations both on the employer's freedom to select his employees and on the employees' personal freedom. It also limits the need for state interference in the union's internal affairs.

I shall not spell out the competing arguments concerning the desirability or prohibiting even this limited form of compulsion. You probably have heard them all. I will merely describe the basis for my conclusion that the Taft-Hartley union shop is a reasonable compromise, which should not be superseded by the enactment of so-called right to work laws. As I develop my position, you will notice that abstract arguments about the right to join or to stay out of associations seem to me less persuasive than judgments about the distinctive character of the community which we call the bargaining unit and about the prerequisites for orderly collective bargaining.

We have already seen that under the majority rule principle the bargaining representative has exclusive bargaining authority, subject, however, to a duty to represent all members of the unit fairly. It is that principle which involves the fundamental limitation on the freedom of the dissenting minority in the organized plant—a limitation more drastic than that imposed by the share-the-cost principle of the Taft-Hartley Act. This fundamental limitation is tolerable because majority rule is necessary for stable and orderly collective bargaining, and collective bargaining has important values which the community wishes to preserve. The continuing authority and responsibility of the bargaining agent with respect to all members of the unit, justifies, I believe, the requirement that all of them should pay a fair share of the cost. It is unreal to require the representative to treat all mem-

bers of the unit fairly and at the same time to free the non-union minority from any financial responsibility. More concretely, it is unreal to require the union as bargaining agent to process the grievances of non-union employees, sometimes at considerable expense, and to protect their interests in collective bargaining, while freeing them from any financial obligation. Such a result is not justified by the general argument that the right to association includes the right to withdraw or to withhold financial support. The union as bargaining agent is not like the ordinary association from which a member can depart at will. The anti-union or non-union employee, so long as he remains employed in the unit is, to repeat, subject to the bargaining agent's authority and is entitled to fair representation. In this context, the usual right to withdraw from a voluntary association is scarcely relevant, let alone controlling.

You may, of course, suggest that the theoretical duty of fair representation is not in practice realized as to non-union employees and that their grievances and interests are neglected. Arbitrators dispute that generality and point to cases where unions have fought the battles of non-unionized members of the unit. There are many motivations for such battles. The interests of union employees may call for vigorous protection of the non-union ones. The bargaining agent may wish to earn the good-will of non-union employees in the hope that they will become members or at least abandon active hostility or any disposition to join a rival. And the bargaining agent may be moved by the ethical and legal obligation represented by the duty of fair representation.

In any event, the law does, and should continue to, impose the duty of fair representation notwithstanding the obstacles to its full discharge in favor of non-union employees. A coherent labor policy would scarcely be advanced by ignoring that duty when the issue is that of fairly allocating the costs incurred by the bargaining agent.

The argument I have made for the Taft-Hartley union shop is not the conventional argument that the non-union employees benefit from union activities and, accordingly, should pay a fair share of the cost involved in getting union benefits. The benefit argument is, of course, open to question. Perhaps non-union employees have the initiative, the industry and the skill which would bring them more rewards, psychic and financial, than they get under collective bargaining. Perhaps, in a given situation collective bargaining produces no benefit for any employee. On the other hand, perhaps non-union employees do benefit and are merely playing the paying members for suckers. In any event, the paying members will feel like suckers and the resultant bitterness may add to the difficulty of achieving the statutory objectives of



protecting the employment of the non-union minority and of insuring that they are fairly represented.

Let me turn to two considerations which complicate my argument. First, union dues are used to finance activities which are remote from collective bargaining and which also may be opposed by employees forced to finance them. I refer primarily to political activities and related activities by which unionism seeks to affect governmental action and to advance its idea of the good society. I recognize that the problem here is especially acute for the non-union member, who lacks even the theoretical possibility of shaping the union's official position. But the problem is also important for employees who belong to the union because of its bargaining activities and in spite of its political activities. The problem involved thus affects all who finance union activities, and it should, I believe, be handled as a general problem, rather than by way of a prohibition of the Taft-Hartley union shop.

The second complication is union corruption, which is now being urged as an independent reason for such a prohibition. Compulsory dues naturally aggravate the corruption problem because they increase the loot and reduce the ability of members or dues payers to protest by withholding financial support. But, again, corruption is a general problem affecting both the majority and the dissenting minority. And, again, I believe that it should be treated as a general problem and should not be attacked by way of the Taft-Hartley union shop.

Before concluding, I should like to make two general points, which may help to put the right-to-work controversy in proper perspective. First, I doubt that "right-to-work" laws are significant in relation to the problems raised by the concentration of power in centralized unions which can substantially influence wage policies on an industry-wide basis. Union security or compulsory union arrangements are, as I indicated earlier, more significant as a consequence, than as a cause, of such power. The railroad unions are a case in point. Although the Railway Labor Act until 1951 barred all such arrangements those unions grew in numbers and did not lag behind in bargaining. The legal remedies for the power of the centralized national unions—if there are any wise remedies—will have to be much more heroic than right-to-work laws.

Although the second point may sound ungracious, it should not be suppressed. Exponents of "right-to-work" laws should consider whether their insistence on freedom of occupational choice and the dignity of the individual may not be excessively specialized. To take only one example, they may wish to consider the relationship of restrictive employer hiring policies as well as FEPC legislation to the symbol of individual freedom which they invoke. Otherwise, they will be open to one of two unpleasant charges: First, that they

are exploiting our traditions of freedom merely to snipe at the union movement; or, secondly, that they are blindly ignoring the many areas of economic life where the protection of the dignity of the individual is still unfinished business and where some employers are not using their economic and moral power to get on with the job.

*Class of 1938—*

*Continued from page 5*

de Legislation Comparee, France; and International Institute of Public Finance, Paris.

Bert Ganzer presently is Supervising Investigator for the United States Civil Service Commission. He was Military Government Court Officer in Germany for two years.

Others of us occasionally have been active in government work. Quintin Johnstone was attorney for the OPA; John R. Canright was Deputy Attorney General for the Territory of Hawaii for six years; Henry Hill was in the General Counsel's Office of the Civil Aeronautics Board in Washington for five years; Franz Joseph has been General Counsel and Director of American Council of NATO; Governor of the Atlantic Union Committee; and Chairman of the American European Foundation. Willis Parkinson has been Special Agent for the FBI. John Lynch has occasionally served as Special Judge; Frank Mahin is Police Judge at Pewee Valley, Kentucky.

Our legal ability is evidenced by our success in staying out of the army. Fifty percent of us successfully evaded (or do I mean avoided?—we never did get to Income Taxes in Prof. Crosky's course on Taxation) military service. Those of us who did serve, did so with distinction. Dick Mullins, Bob Haythorne and John Canright achieved the rank of Lt. Colonel; Mel Cohen and Walter Bernald were Majors; Art Sachs, Sheldon Bernstein and Roger Baird were Lieutenants in the Navy; Tom Megan was Captain and Battery Commander in Hawaii, the Philippines and Okinawa. Irwin Askow also achieved the rank of Captain. The overall average was dragged down somewhat by a couple of clods like Jim Stevens and Maury Rosenfield who never got above the rank of Private, but the overall picture was good.

We have been reasonably active in civic and professional affairs; Robert Macdonald was a member of the Board of Managers of the Chicago Bar Association for two years and Chairman of the Entertainment Committee of the Chicago Bar Association; Frank Mahin is Elder and Clerk of the Session of the Pewee Valley Presbyterian Church; Henry Hill is a member of the Board of Education of School District No. 34 in Glenview, Illinois; Richard Mullins has been a member of the Board of Park Commissioners and



of the City Planning Commission of Wichita; Lee Shaw was Chairman of the Grievance Committee and a member of the Board of Managers of the Chicago Bar Association; Franz Joseph has been Chairman of the Committee on Naturalization and Confiscation of the International Bar Association and on the Committee on Extraterritorial Application of Taxes of the American Bar Association; Zalmon Goldsmith has been President of the Kane County Bar Association, Vice President of the Aurora Bar Association, President of the Aurora YMHA, Chairman of the Aurora Committee for Constitutional Revision, Chairman of the Aurora Red Cross First Aid Committee, and Chairman of the Professional Division of the Aurora Community Chest; Irwin J. Askow has been Librarian, Member of the Board of Managers and Chairman of the Public Relations Committee of the Chicago Bar Association; John R. Canright has acted as Director and Secretary of the Lanikai Association, Oahu; John Lynch has acted as School Attorney for the City of Lafayette, and Officer of the Crown Point Lowell Bar Association; Walter Berdal is Warden of his Church; Harry Kalven, Jr., is a member of the Illinois Supreme Court Committee of Jury Instructions; Marcus Cohn has been Chairman of the Committee on Cooperation of the Examiners of the FCC Bar Association, on the Legislative Committee of his PTA and Precinct Chairman for the Democratic Party; Richard James Stevens has been a Member of the Board of Managers of the Chicago Bar Association and Chairman of the Board of Trustees of the First Unitarian Church of Chicago.

A couple of us have done some writing in the legal field. Franz Joseph has published articles on Discretionary Trusts, Domicile and Residence, Organizing International Businesses, International Aspects of Nationalization, Income Tax Treaties, Death Tax Treaties, Estates of Aliens; and Foreign Sales. Harry Kalven, Jr., is working on a case book on Torts and is co-author of "The Uneasy Case for Progressive Taxation."

We seem to be a sedantary group. About the only one who has revealed any activity in sports is Irwin J. Askow who was Chicago City Champion in the Squash Racquets B League. Walter Berdal has developed a considerable interest in astronomy and is a member of the Atlanta Astronomy Club; and Richard James Stevens was one of the winners of the Chicago Bar Association Duplicate Bridge Tournament two years in a row. Other than that, we seem to have kept our eyes glued to the TV Sets.

Melvin Cohen summed it up pretty well with his remark "I claim to be a successful father." All in all, we may not have set the world on fire, but have behaved ourselves reasonably well.



*Fred L. Strodbeck*

*Kalven—*

*Continued from page 8*

once again the result is to add a degree of freedom to the jury, leaving them without even the guide that recent roughly comparable cases might offer.<sup>21</sup>

Finally, there is one point at least on which instructions might be much improved. This is the handling of the reduction to present value formula.<sup>22</sup> In the case of serious disability or death of a relatively young wage earner the discount is of course very substantial. The point is a notably subtle one to convey quickly to the layman not already familiar with it and we can be certain it is not conveyed by a mild reference to limiting the award to "the present value of the losses." Our study has at least one example where a serious split in the jury on damages seems to have arisen directly from the failure to make the discount point effectively to the jury. The low and high award factions as post trial interview disclosed were in fact in virtual agreement separated simply by the amount of the discount. Yet neither side recognized this and they finally were forced to compromise the difference.

It is true that in a carefully tried case counsel will make the discount point and may well handle part of the jury's difficulty by using annuity tables. This raises



one last reflection on the problems of controlling the jury on damages. Many trial courts tend to regard themselves as in sort of a partnership with counsel in the presentation of the case, and more particularly the law, to the jury. Able closing arguments will substantially increase the communication of the relevant law, and perhaps the chief hope of orienting the jury on damages lies with counsel. And this in turn suggests the query whether defense counsel have not despaired too much of their potential for arguing damage points with vigor.<sup>23</sup>

## II

If the jury writes the law of damages in personal injury cases what kind of law does it write? The question cannot perhaps be answered quite so bluntly. But what can be noted with almost endless variation and interest is the response of the jury's common sense equity when confronted with the formal legal rules. To paraphrase Justice Holmes, the jury provides a kind of legal litmus paper for testing and illuminating the policy dilemmas concealed in our general personal injury damage formula. The jury is the most interesting of the critics of the law.<sup>24</sup> What emerges are not so much totally new points as old points seen with a fresh emphasis. For the truth seems to be not that the jury is at war with the law but that its views are somewhat askew the traditional legal norms. The jury agrees wholly with much of the law but at times it makes distinctions the law chooses to ignore and at times it ignores distinctions the law chooses to make.

The first point that impresses is simply how difficult the job really is. The jury almost always is asked to reach decision on imperfect, incomplete and conflicting evidence. And to a stunning degree this is true where future damages are claimed in the personal injury action. Here the jury is asked to guess the future. How long will plaintiff live? How quickly and how fully will he recover? How long will he need medical treatment? How long will the pain last? How much will the dollar be worth ten years from now? This ambiguity, as we have said, greatly increases the jury's freedom and affords them the chance to use their special equities, but it also disturbs them to decide so much of a man's future fate. And more than one jury has been puzzled as to why the future cannot be left in the custody of the court to be adjusted as the future events require much in the fashion of alimony payments. In any event, the jury reminds us that one of the great architectural rules of the personal injury damage law is the rule that the whole controversy must be disposed of now, once and for all.<sup>25</sup>

Almost every familiar rule appears immediately more arresting when seen as the jury struggles with it. Take first a rule which rarely reaches appellate

articulation but which faces the jury in virtually every case. The rule is that issues of liability and issues of damage are totally separate. If the trier is persuaded that a preponderance, however narrowly, favors liability he is then to award the full damages proved. He is not, that is, to discount damages because of his doubts as to liability. And equally, in a negligence case at least, he is not to increase damages because of his view of the degree of fault in the defendant's conduct. If we imagine for a moment a series of cases in which the facts as to damages remain identical but the facts as to liability range over the full and rich possibilities of negligence,<sup>26</sup> the legal view is that the award should be constant throughout the series. The jury's view is that these may be significantly different cases.

In a case such as *Fuentes v. Tucker*<sup>27</sup> an echo of the problem may reach the appellate court. Here in a wrongful death action the defendant admitted liability and sought unsuccessfully to keep out of the trial the facts as to liability. On appeal the admission of this evidence was challenged as error. The majority of the California court speaking through Justice Gibson held that such evidence, except as it might bear on damages, was irrelevant and its admission error, but affirmed the judgment for the plaintiff since there was no evidence that the award itself was excessive. In a concurring opinion Justice Carter with his usual vigor disagreed that it was error at all and went close to the heart of the matter. His statement is worth somewhat lengthy quotation:

"The effect of the majority holding in this case is to deny to an injured person the benefit of presenting to the trier of fact the entire factual situation surrounding the accident out of which the injury arose. It cannot be denied that either a jury or a trial judge is more disposed to award a substantial amount of damages in a case where the defendant is shown to have been guilty of gross negligence and his conduct was such as to indicate a reckless disregard for the safety of others, than where the negligence amounted to only an error in judgment. The present holding will make it possible for a defendant who has been guilty of the most heinous kind of reckless and wanton conduct, including intoxication, to conceal from the trier of fact the extent of his culpability, and thereby gain any advantage which might flow from the absence of such disclosure. Theoretically and technically, and judged by academic standards, this practice may be justified, but when gauged by actual experience in the administration of justice it favors the worst offenders by permitting them to escape from a larger award of damages which the trier of fact might feel justified in awarding if the entire picture were presented. This does not mean that a person injured as a result of the negligence of another should receive more damages because his tortfeasor was grossly and wantonly negligent than another with like injuries whose tortfeasor was only slightly negligent. But it simply recognizes the human tendency to weigh liability against culpability. Since the law must be administered by human beings, the effect of this tendency must be considered as incidental to its administration. To argue to the contrary requires a denial of the obvious.



"Therefore, if I were disposed to hold, contrary to the weight of authority and the long settled rule in this state, that it was error for the trial court to permit plaintiff to prove the facts relating to defendant's negligence, I would be required to hold that such error was prejudicial and compelled a reversal of the judgment. This conclusion would be required because of the probability that the damage award was increased as the result of the evidence erroneously admitted. If it cannot be said that the effect of such evidence was to increase the award of damages in this case, it likewise cannot be said that such evidence would have the effect of increasing the award of damages in any case. It must necessarily follow that the admission of such evidence could not be prejudicial in any case, and to hold its admission erroneous is as idle as fighting a windmill."

Who has the better of the debate? Is the plaintiff entitled to the full measure of jury justice or is he entitled, when control is feasible, only to what the formal rule allows? I think Justice Carter is right about the fact of jury behavior in such matters. And the argument for his policy conclusion is that since the plaintiff has of necessity this jury bonus in the majority of cases it is discriminatory to deprive him of it only in the occasional case. In any event once more we have the familiar problem. The rule is clear that punitive damages are not allowable in the ordinary negligence case and I would suppose that Justice Carter would agree that it is error to instruct a jury that they may be given. Yet we are not so sure how we feel about the rule, and once again may be willing to have the jury modify the rule *sub rosa*.

The point is at least as interesting when the shoe is on the other foot. Presumably a plaintiff with sound damages and doubtful liability might attempt to stipulate damages and seek to contest only liability to prevent the jury from discounting damages. In all likelihood this is the far more frequent problem for the jury; and our evidence in a variety of ways suggests that the jury does discount. At times the discount may reach the appellate court when it is the product of a compromise between jurors favoring no liability and jurors favoring liability with substantial damages. Occasionally the damages may be clear enough to make it evident that the verdict must have been reached by compromise. The court may then find the verdict bad either because inadequate or because the result of so naked a compromise. But it is our impression that in many cases the discount results from something more subtle and impossible to detect in the verdict. The jurors individually and within their own minds may simply fuse the liability and damage issues sufficiently to shade their estimates of the damages.

And finally and frequently the point may arise not because the jury is so doubtful about defendant's conduct but because it feels that someone else was also at fault and that the defendant should not bear the entire burden. This is the source of its behavior when in the teeth of the contributory negligence rule<sup>28</sup> it neverthe-

less finds for the plaintiff but finds less. And this is the route by which it not infrequently reacts to the rules against imputing negligence. It does so not by a logic directly challenging the rule but by discounting defendant's burden because he was not totally responsible. Thus the jury law may look a good deal different than the formal rule—and, it is important to note, not always in the direction of favoring the injured victim.

We come then to a point of some general jurisprudential interest. To what extent could the law, if it would, recognize and legitimate the jury's rule in these matters. Where contributory negligence is in issue the law can do so by adopting a comparative negligence formula. But it can hardly write a formula that would accommodate the other distinctions the jury sees—the subtle gradations of moral fault in defendant's conduct or the ambiguities in the basic evidence itself. And as to imputed negligence we may again have the jury reaching a tolerable compromise between the harsh old rule that barred the innocent plaintiff altogether and the modern rule that perhaps ignores too much the reality of the family as a unit in litigation.<sup>29</sup>

What has been said already makes it evident that the jury also has a tendency to apportion fault and hence damages among tortfeasors—that in brief the old common law rule is as contrary to common sense as it has long been thought to be. Thus in one of our experimental jury sequences which involves two defendants, the jury has been known to ask if it could not award \$5,000 against one defendant and \$70,000 against the other. Certain of the modern apportionment statutes would legitimate the jury's sense of the equities. But in the absence of such legislation the jury can "apportion" only when the other tortfeasor is not party to the suit.

What is so impressive about the jury's equity often is that its view is in fact the law in another state or country or is at least a reform proposal that has articulate spokesmen in the literature. And where it is not, the reason is simply that the equity is too subtle to be codified.

Many other examples of the jury's polite war with the law could be offered. We touched on several in Section I: the jury reaction to fees, interest, and taxes are obvious examples. Let me consider briefly a few others. The first is the jury response in the death action of a young child. Today when the labor value of a child is likely to be negligible and the costs of raising him considerable the harsh fact is that strict obedience to the legal rule means no damages. Yet the death of a young child must be the most serious of all personal injury damage. Once again we reconcile the formal rule with our conscience by relying on the jury to not follow the rule fully. And the jury appears to use some discretion. It does not attempt the heroic



task of paying the parents fully for their grief; it distinguishes clearly between killing the child and permanently disabling him. But it does honor the parents' grief somewhat. And once again this is perhaps a quite tolerable solution of a difficult policy point on which we are understandably reluctant to legislate.<sup>30</sup>

The second example is the collateral benefits rule. It is widely recognized of course that this poses a problem to which there is no altogether satisfactory solution.<sup>31</sup> But what evidence we have suggests that the jury does not like the rule. Their plaintiff sympathy does not extend to compensating the plaintiff for a loss which some other source has already made good. And they recognize more instances of the issue than does the formal law. In another of our experimental cases the plaintiff is injured while driving as a passenger in her employer's car. The suit is against the driver of the other car and there is little to suggest negligence on the employer's part. Yet a frequent theme in the experimental jury deliberations is the likelihood that the employer will do something for the plaintiff if she cannot work as fully as before and that this "something" ought to be considered in estimating how much the defendant should pay. A similar notion appears in cases we have studied by post trial interview where an elderly person with adult children has been injured. Here the jury looks in part to the children to supply support almost as though the plaintiff had accident insurance. And then there is the case of the attractive young widow whose damages were reduced because the jury found her attractive. Their view as disclosed in interview in brief was that a girl that attractive would have no trouble in remarrying and if she did not remarry it was pretty much her own fault and a failure to properly mitigate damages.

The third example is closely related. It is the obverse situation where the plaintiff has a family to support. The law is clear that, death actions apart, the tort is to the plaintiff and not to his family but the jury is likely to keep the family very much in mind. It is our impression that where the facts as to liability and damages are ambiguous, damages are likely to vary in accordance with the number of dependents looking to the plaintiff for support. And this may suggest one source of the jury's coolness toward contributory negligence as a total defense. They may often see it as imputing the plaintiff's negligence to his family—a point which has been explicitly noticed by commentators where the plaintiff is killed and the question is whether his negligence bars the claim of his survivors.<sup>32</sup>

I have not talked as yet about two other widely discussed examples; pain and suffering, and insurance. Briefly our impression is that the jury is less responsive to pain and suffering than popularly supposed. Its chief importance may well be in cases where the

accident was real and serious but where the other damages do not somehow quite add up. Reverting again to data from the experimental jury, we have instances where the degree of permanent disability is very difficult to assess although the injury was genuinely painful. Here a juror sometimes argues for a given total by the twin position that either the disability may turn out to be serious in which case the sum is justified or if it does not then no injustice is done in treating the sum as recognition of the pain and suffering.

Consider for the moment the well known *McNulty* case<sup>33</sup> where California Court affirmed a verdict of \$100,000 on behalf of a double amputee who made a quick recovery and was restored to his former job, incurring special damages of only \$3,000. The court justified the verdict as an award for impairment of earning power since a man so handicapped might not fare so well in the future whatever his present position. Mr. Belli reads the case as an award "solely for pain and suffering."<sup>34</sup> I would incline to guess with Professor Jaffe however that this is an example of the jury reacting not to explicit pain and suffering but simply to so gross a violation of plaintiff's bodily integrity. I appreciate the thrust of Professor Jaffe's carefully and sensitively stated challenge to the premise of such decisions. And perhaps the award is excessive. But as long as we have a system of personal injury damage awards it would, I think, seriously disturb us to place the plaintiff's damages at \$3,000. And I will add the brave guess that had plaintiff's objective losses been \$50,000 he would not have recovered appreciably more.

Finally turning again to Professor Jaffe's heroic thesis that it is unsound to recognize pain and suffering as a head of damages. I would suggest that an explicit change of the law to deny such damages might not affect jury verdicts very much. The situation might well turn out as it has with the death of the young child. It is not likely to matter too much in the normal case where there are serious other damages and in the special case like *McNulty* we are not likely to have the courage to say the jury would be wrong in blinking at the rule.

Finally a word about the jury and insurance. Of all the points of "jury law" this has long been the most widely recognized. There is familiar law on the propriety of insurance questions on voir dire and on admissibility of evidence of insurance for limited purposes during trial. In states like Texas and Tennessee there are even precedents that the mention of insurance in jury deliberations may impeach a verdict.<sup>35</sup> Certainly the prevalence of insurance has affected the thinking of everyone about tort and the project will report in some detail about its impact on the jury. Thus there is evidence suggesting that the lawyer



strategy on voir dire does not work; most of the jury does not understand the point of the insurance questions. But they think there is insurance anyway. There are interesting suggestions that some jurors, echoing as it were Professor Ehrenzweig,<sup>36</sup> see in the failure to insure a kind of negligence. There is evidence that the silent instruction on insurance leaves the jury in the dark as to the propriety of considering it. There is the appearance from time to time of the juror who is explicitly concerned with the level of insurance premiums.

But the points I should like to underscore here are three. First that liability insurance, at least in auto cases and for the business enterprise defendant, is now so frequent that its impact on the jury is probably reduced. Second that it may have a somewhat different relevance for jury thinking on damages than for their thinking about liability. There is the arresting suggestion in some of our data that the effect of insurance may be not so much to inflate damages as it is to persuade the jury that the full loss be placed on the defendant. That is, doubts as to insurance are likely to cause the jury to award less than what it regards as the adequate award, out of regard to the burden it places on the defendant. And finally there is the underlying premise which an occasional juror puts into words. Insurance and ability to pay are relevant only in the case of real doubt. There is no simple jury rule that the insured defendant cannot win. Rather it is that where there is doubt and consequently the risk of injustice and error in deciding the case either way, it is better to risk error against the insurance fund than against the injured plaintiff. The result therefore is a subtle shift of the burden of proof, particularly on damage issues, to the insurance fund.

This last observation invites a strong note of caution as to what has been said in this section. I have been reporting primarily on what the jury *talks* about<sup>37</sup> when confronted with the various damage issues. For several reasons such data although relevant must not be taken too literally as prediction of jury decision. On many points we have at most suggestive anecdotes not systematic data. Again what has been reported is almost always the reactions of some individual jurors, not the consensus of the jury as a whole and it is the jury as a whole that makes the decision. The give and take of the deliberation process and the requirement of a group decision operates to limit greatly extreme tendencies to do equity as one or two jurors may see it. The jury is likely to be more conventional and in accord with the law than is the individual juror. As we shall note more fully in the next section, jury discussion is highly fluid, arguments are frequently rationalizations or rhetoric or face saving gestures making possible changes in position and there may be a wide gulf between the way the jury talks and how it finally

decides. The quest especially in damaging is, as we have said, for the felt appropriate sum. An argument about pain and suffering or children to support or fees or insurance may supply a useful defense of a position. But if that argument is made unavailable, another is likely to take its place and the damage sum remain unchanged. And to return to the moral of the insurance example, the jury's special equities are likely to come into play only where there is a gap of ambiguity in the facts, where, that is, the controversy is close to indeterminate. Then the jury may utilize the freedom created by the doubt to add some equities the law ignores.

### III

Our third general point is to look at the damage issue somewhat less from the viewpoint of the lawyer and more as the student of behavior would see it. The jury project has been a collaborative effort by lawyers and social scientists and here we pick up their emphasis. The difference is chiefly one of emphasis however since their points will have their legal counterpart.

The first general point is what we might call the variance in jury verdicts. The experimental jury technique has made an important contribution here by making it possible to try the same case several times and compare the results. This is an opportunity the legal system can very rarely provide and even when it does it is always a somewhat different case on retrial. The key point then is that if we run say ten trials of the same personal injury damage case we are very likely to get ten different results. And the experimental jury results provide therefore direct experience with the range of possible verdicts in a given case and also some sense of their relative probability.<sup>38</sup> This underscores the familiar point that jury law is unstable and uncertain, and more important it provides the proper intellectual model for thinking about jury decision making. A jury verdict is simply one of a series of possible verdicts for the single case.<sup>39</sup> And this in turn means that at most we should talk of *averages* when we talk about jury tendencies. The first point then is simply that this is the way it really is and that this variance is somewhat concealed from our normal view of the jury by the fact that we try the case only once.

But from a slightly different standpoint this averaging process is quite familiar to the trial lawyer. It makes explicit what he must in part be considering when he evaluates a case for settlement.<sup>40</sup> If he says a case is worth \$20,000 he means not that a jury will invariably give \$20,000 and, if he is very thoughtful about it, not that any jury will give \$20,000. He means rather that the average of a series of verdicts in this case will be around \$20,000 and that therefore he runs the smallest risk of error in settling as against



trial if he sticks to his \$20,000 figure. Our first experimental case supplied a vivid example of this. We had taken our script from an actual case which was settled just before the verdict for \$42,000. We ran ten experimental trials of the case; the verdicts ranged from \$17,500 to \$60,000 with only one \$42,000 verdict and only one \$40,000 verdict. Yet the average for the ten cases was \$41,000.<sup>41</sup>

The settlement process in personal injury cases is an integral part of the total decision making institution; the vast majority of cases are disposed of by the settlement mechanism; and jury law controls not only the small minority of cases finally tried to verdict but those settled as well since the yardstick for settlement is the expectation of jury decision. And in weighing such expectations the bar more or less explicitly recognizes that they are dealing with the average verdict in the individual case.

The source of this variability in verdict is two fold. It results from the ambiguity of the facts and the law which makes for difference in viewpoint, and from the enormously wide public from which the jury is recruited, which makes it likely that those different viewpoints will be differentially represented on different juries. In brief, particularly on issues of personal injury damage the jury system puts to the public precisely the kind of question on which differences in background, temperament and experience are likely to produce a difference in opinion. Or to put this another way, it is still regarded as a somewhat refreshing point to observe that changes in the personnel of the United States Supreme Court may have something to do with changes in its decisions. But with the jury we take for granted that personnel as well as rule and tradition make a difference.

From the viewpoint of the social scientist the jury offers a rich possibility for exploring further the correlations between background and opinion, a topic of wide general interest to him. We have talked thus far of the jury's sense of equity as though it were a single uniform sentiment interestingly different from the legal norm. But the truth of course is that so heterogeneous a population as the American jury has a great variety of sentiments on any given issue. And it is therefore pertinent to see what can be learned about what kinds of people have what kinds of views. Roughly we can break our inquiry into two stages. First what kind of background and experience will dispose one individual juror to a given view at one end of the trial and before the deliberation begins, and second what kind of jurors will be influential in the deliberation process where the view must weigh if it is ever to matter to the result.

This is not the place to detail the results of our inquiry. But this much might be emphasized. First, we find repeated correlations between some back-

ground factors such as ethnicity and the jury's viewpoint on damages in the particular case. Second, as with the social sciences in general at this stage of their development,<sup>42</sup> the factors which correlate best are the demographic variables like ethnicity, occupation, income, etc. But these are relatively crude indices and do not contain on their face the explanation for the correlation. Our quest for deeper factors such as personality traits or basic sentiments which would both explain more and correlate more tightly has been only modestly successful. Third, we are again speaking only of averages; there is great variation within any general category of individuals. Thus on the average, business men of Scandinavian origin tend to be conservative on damages, but this or that individual Scandinavian business man might be enthusiastically pro-plaintiff. Fourth, some juror types who are most strongly pro-plaintiff or pro-defendant are most easily influenced to change their views in the deliberation process. But again the tracing of juror influence in the deliberation is a subtle and difficult matter. Fifth, we have made a special study of the regional variations in awards which permits us to make a fair map of the award "temperature" in the United States. But once again the explanation as to why different regions differ so much is hard to come by.

It should be abundantly clear by now that what we talk of as correlations between demographic variables and juror pre-deliberation bias is altogether familiar to the trial bar however alien the vocabulary. The institution of voir dire examination is the lawyer's version of the same point. In his exercise of peremptory challenges he is practicing the art of the social scientist. One phase of our study is therefore concerned with finding out what rules and hunches the lawyer plays in actual practice and how closely these check out with our own results. Suffice it here to note that the lawyer has observed well and it is somewhat a matter for mutual congratulation that our results are so close to his; similarly our study of regional variation has its obvious counterpart in the migratory tort suit and here again the bar and we are largely in agreement.

Men differ as jurors not only because of the differences in their backgrounds but also because of the differences in their experience. One of the most interesting chapters of the jury study concerns the juror's use of extra-record information in the deliberation. Whatever the law's interest in keeping the trial record aseptic, it cannot in fact prevent the juror from augmenting it out of his own experience. Thus the record is enlarged in the jury room by juror testimony. And the documenting and inventorying of this addition to the record is a fascinating business indeed. One recurring instance of this has special relevance



for the damage issue. It concerns the juror's reactions to medical testimony and to illness in general. It may be as simple as the juror's identification with the injured plaintiff where he himself or a close friend or relative has experienced a comparable injury. The bar has recognized this in its aphorism that the risk of having the aged and infirm on the jury is that the defendant will have to pay for their ills as well as those of the plaintiff. It may take the form of grave suspicion of ills less obvious than the broken leg, on the general view that no one feels altogether healthy anyway, or more concretely as in the case of a railroad man plaintiff where several jurors knew railroad men intimately that no real railroad man would complain about such minor ills. Or the very vagueness of the ailment may turn in the jury's eyes into a guarantee of authenticity as in the case of a back ailment where all the medical testimony tended to show that the doctors could find nothing organically wrong. In one such case which we studied through posttrial interview a juror indicated that his mother had complained of such an ailment for thirty years, that no doctor had been able to find anything wrong, *and* that he was certain his mother was not a hypochondriac. The jury faced with the delicate choice of believing the plaintiff or of charging his mother as a hypochondriac sided in the end with the plaintiff.

There remains then the pooling of individual juror views in the deliberation process to yield the group verdict. Here again the jury involves an important area of research in contemporary social science—the study of small group behavior. And here the blending of the lawyer's perspective with its emphasis on the logic of argument with the social scientist's perspective with its emphasis on the social process of the group has proved a considerable but a rewarding job. The lawyer is likely to view the deliberation as simply a formal debate; the social scientist is likely to view it as group problem solving where everything but the content of the problem is of interest.

The dynamics of group behavior in the jury room is too complex a story to attempt here. The great point is that a jury verdict is a group product, that the jury is not simply an atomistic electorate, but must work to a solution which is at least tolerable to all twelve. One result is that the filtering of individual eccentricity through the group process furnishes a major safeguard in the jury system. It is not merely that twelve heads may be better than one but that a verdict hammered out as a group product is likely to have important strengths.

We have anticipated in the prior discussion several of the most important points about the jury's behavior when it turns to the damage issue as a group. The cardinal point is that the quest is more for the appropriate sum than for the summation of the specific

components. The impression, as already noted, is one of considerable fluidity in argument—the sum is more important than the arguments advanced on its behalf. If this argument is disallowed another will take its place. And one important reason the jury can reach agreement is that it does not try for agreement on all the subordinate premises. Juror A may rate pain and suffering more important than Juror B and Juror B may take disability as more substantial than Juror A. They will air these differences, to be sure, in the deliberation but they will not insist on their resolution so long as by whatever route they can agree on the overall sum.

One illustration of this will have to suffice. We touched earlier on their view as to lawyer's fees as damages. Do they actually award fees? The answer is not simple. They frequently discuss them in the deliberation. They see no impropriety in so doing. They are frequently well informed, although not always, about the level of contingent fees today. Does this then mean that awards are higher by the amount of the fee? We seriously doubt it.<sup>43</sup> First we virtually never have a jury which after agreeing on the proper damage figure then decides on the fee as a group and adds it. We have some property damage cases where the damage is more objectively set and in these the jury does not consider the fee. And we have a variety of suggestions that the fee point is used simply as a device in argument to facilitate agreement. Perhaps the most vivid illustration occurs in an experimental jury deliberation where a majority of jurors finally reach agreement on a sum which does not reflect fees. In an effort to persuade one of the hold-out low award jurors the point is made for the first time. The hold-out agrees he has overlooked fees and raises his figure accordingly. An over logical member of the majority then asks about the majority adding fees to their award and is quickly and decisively rebuffed.

The miracle of the jury is that it is somehow able to reach agreement despite the divergent views with which it enters the deliberation. This is the result of many pressures including a great reluctance to fail to do their job and have the jury hang. In part it is the result of a decent respect for the opinions of others on matters where certainty is hard to come by. In part it is the result of a subtle shift in their own perception of the facts as the deliberation continues. We find with high frequency that a genuine consensus has been reached at the end with the jurors now preferring the jury verdict to their original position. And finally in part it is the result of negotiated compromise when argument can go no further.

We come then to the quotient verdict. Is the damage award simply the quotient of the twelve individual answers? Here again the answer is complicated. The final awards will not infrequently come





*Morton Brody, A. B. Bates College, of Maine, a third-year student who, together with Robert Cornwell, B.A. Central State College, of Oklahoma, coached the Student Forum, the University's intercollegiate debate organization, to an unusually successful season.*

close to the original pre-deliberation averages for the group. But this will often be the result even though a quotient is never taken. There is a natural tendency for the extremes to come toward the middle as the range of positions is disclosed. The jury often takes a quotient early as a guide but then goes on with its deliberation. And in the cases where the quotient is the final answer the compromise usually comes late after a serious effort to bridge difficulties by other means. The merit of a compromise verdict is thus difficult to assess without knowing the full context of the deliberation.

In general we have concealed from ourselves, the difficult position in which the formal law may place the jury. Surely there is nothing about the damage issue in many personal injury cases which makes it likely that twelve men acting seriously and in good faith can reach full agreement on it. What do we then want the jury to do? There are only two alternatives left: negotiated compromise or a hung jury. The practical jury almost always prefers the former with the interesting result that the function of the jury in the end may be not to adjudicate the case, but, as it were, to settle it vicariously.

In any event, the nature of the damage question permits the jury to behave differently than do the

yes/no issues of guilt and liability. It permits the small adjustment, the slight shift and if necessary, the full compromise which makes the verdict possible. The damage verdict therefore is especially likely to reflect the composite view of the jury as a group and not to be the product of the single strong juror or the strong faction. Perhaps the legal system should seek some way to avoid having questions of such flexibility and indeterminacy arise, but so long as it continues to furnish them the jury would seem to provide remarkably congenial mechanism for their official resolution.

And to return once more to pain and suffering. Whatever else may be said for or against recognition of it in damages, it does because of its ambiguity provide a useful grease for the jury machinery.

#### IV

We have left to a brief postscript the consideration of the parallel performance in comparable cases of the judge. Logically perhaps, this is the first question to ask about the jury—how differently do judge and jury decide the same case. We are by no means clear on how much like the judge and how different from him we wish the jury to be. If it is too much like the judge, the jury may lose all claim to a distinctive function. If it is too little like him we are disturbed by how easily jury equity elides into jury anarchy.

The question is specially pertinent for the personal injury case where the jury is so widely thought, as jury waiver ratios indicate, to favor the plaintiff. A major segment of the jury project is devoted to a survey in which trial judges have reported on a case by case basis how they would have decided on bench trial actual cases tried before them with a jury.<sup>44</sup> Once again the results indicate considerably more complexity than the popular view supposes. I shall not report that data here except to note two points. First, the difference is not monolithic. While jury awards on the average are higher than judge awards, there are a surprising proportion of cases in which the judge would have given more than the jury in fact did. Second, the detailed profile of judge-jury differences obtained from the survey gives us another perspective on the jury's sense of equity and the law's success in controlling it.

The judge and jury are two remarkably different institutions for reaching the same objective—fair impersonal adjudication of controversies. The judge represents tradition, discipline, professional competence and repeated experience with the matter. This is undoubtedly a good formula. But the endless fascination of the jury is to see whether something quite



different—the layman amateur drawn from a wide public, disciplined only by the trial process and by the obligation to reach a group verdict—can somehow work as well or perhaps better. And in any event in its persistent struggle to dispose of the difficult issues our legal system gives it—among which measuring personal injury damages occupies a prominent place—the jury throws much light on the ultimate issues of justice involved.

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*This article owes a major debt to the work of several colleagues on the jury project; in particular to Fred Strodtbeck, Hans Zeisel, Dale Broeder, and to Allen Barton, Saul Mendlovitz, Rita James, and Philip Ennis. Their work will in the reasonably near future be published in its own right. The debt is to the stimulus of innumerable discussions as well as to their data.*

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#### FOOTNOTES

<sup>1</sup> Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 *Law and Cont. Prob.* 219, 221 (1953).

<sup>2</sup> Professor Jaffe's principal point is that there is a serious tension today between the drive on the one hand to extend liability coverage and the drive on the other to make damages increasingly comprehensive and "civilized."

This tension is vividly illustrated in the current controversies over FELA. Here it is recognized on both sides that the employees have for the moment the best of two possible worlds—a de facto strict liability system combined with common law jury damages. It is also the point of Professor Morris' shrewd remark that if an auto compensation plan finally comes it will be as a result of its sponsorship by defendants. Morris, *Torts* 374 (1953). See also the handling of the award level in Ehrenzweig, *Full Aid Insurance for the Traffic Victim* (1954) and Kalven, *Book Review*, 33 *Texas L. Rev.* 778 (1955).

<sup>3</sup> The point is perhaps no longer quite so true as it once was. The Shulman and James and Smith and Prosser casebooks do have sections on damages. The recent Harper and James treatise on torts devotes a full chapter to it.

<sup>4</sup> For a brief report, see Kalven, *Report on the Jury Project, Conference on Aims and Methods of Legal Research: University of Michigan Law School* (1957) 155.

By use of post trial juror interviews, survey, and experimental jury techniques the project has been studying various aspects of the American jury system, with special emphasis on jury decision making behavior. The results will be reported out over the next two years or so in a series of volumes. It is important to emphasize that our research methods can give only an approximation of actual jury behavior. The post trial interview with jurors is subject to inaccurate and incomplete recall; the experimental jury technique involves behavior on mock cases. There is therefore a margin of error on what is reported here as jury reaction. But we are persuaded that the evidence from these indirect approaches is plausible enough to warrant discussing it seriously as indications of actual jury behavior.

<sup>5</sup> This is slightly overstated. 'Reasonableness' does appear in the rules as to medical loss and the rules as to the duty to mitigate damages.

<sup>6</sup> Again, this is a slight overstatement to the extent that lawyers' fees and interest are to be considered part of plaintiff's loss.

<sup>7</sup> Yet it is error to omit the instruction. *Benedict v. Eppley Hotel Co.*, 159 Neb. 23, 65 N. W. 2d 224 (1954).

<sup>8</sup> There is a useful collection of cases in which damages were challenged on appeal as excessive in a lengthy note in 16 *A.L.R.* 2d 3 (1951). The note covers all cases other than death actions over the decade 1941-1950. In only 297 of the 1339 cases in which excessive damages were appealed was the award modified. On appellant control generally see Miller, *Assessment of Damages in Personal Injury Actions*, 14 *Minn. L. Rev.* 216 (1930); Jaffe, *op. cit. supra*, note 1.

<sup>9</sup> See for example, *Florida Greyhound Lines v. Jones*, 60 So. 2d 396 (Fla. 1952) affirming as not excessive an award of \$50,000 to a housewife for loss of future earning power.

<sup>10</sup> The point is less forceful in death actions where the disability is unambiguous and pain and suffering of the survivors is officially disallowed. But here the death of wife or young child presents a highly ambiguous issue. See Note, *Damages for the Wrongful Death of Children*, 22 *Univ. Chi. L. Rev.* 538 (1955). And the law treats the issue of the degree of support as a question of fact to be proved in detail in each case even where decedent has a wife and young children and has been living with his family. Compare *Allendorf v. Elgin J and E. Ry.*, 8 Ill. 2d 164, 133 N. E. 2d 288 (1956) cert. den. 352 U. S. 833 (1956).

<sup>11</sup> The use of impartial medical experts as in New York is in a sense another control device insofar as it reduces the ambiguity of the medical evidence. See *Impartial Medical Testimony*, Association of the Bar of the City of New York, (1956).

<sup>12</sup> The project is studying the impact of special verdict procedures but chiefly in connection with liability issues.

<sup>13</sup> Compare however *Hogan v. Santa Fe Trail Tr. Co.*, 148 Kan. 720, 85 P. 2d 28 (1938), where the disclosures of the damage computation under special verdict made it possible for the court to scrutinize and disallow the damages awarded for plaintiff's loss of enjoyment from being unable to play violin in the future.

<sup>14</sup> There are of course some important practical difficulties with the procedure suggested.

<sup>15</sup> We sometimes have the impression that a jury has only so much energy and if it is spent on the liability issue, there is likely to be "fatigue" when they finally get to damages.

<sup>16</sup> This had interesting consequences. The jury was led far afield in its search for minimum subsistence standards and considered seriously such items as alimony, workmen's compensation, and National Service life insurance.

<sup>17</sup> These issues are discussed in detail elsewhere in this symposium; see

<sup>18</sup> Our evidence however concerns the sensitizing effect of an instruction to disregard insurance. It is quite possible that an instruction not to award fees would "boomerang" less.

<sup>19</sup> Whether in fact the jury does add the fee to the award so as to make it higher than it otherwise would be is a complicated matter; see discussions *infra* p.

<sup>20</sup> *Waldon v. The War Office*, [1956] 1 All England Reports 108.

<sup>21</sup> The jury does have an informal sort of precedent supplied by jurors with prior experience, by reading of cases in the newspapers, and by the general gossip in the jury pool. The lifting of the award "ceiling" in a given locale, which has been a chief target of NACCA, is one aspect of this. The impact of the "precedent" of one well publicized high award appears to be considerable.

<sup>22</sup> As to whether it is error for the trial court to omit the formula see *Borzea v. Anselmi*, 71 Wyo. 348, 258 P. 2d 796 (1953); Note, 32 *Neb. L. Rev.* 583 (1953).

<sup>23</sup> For example, our experimental jury work has studied in detail the effect on awards of changes in the ad damnum. The results



suggest that defense counsel may perhaps be missing a trick in not offering a competing figure for the jury to take with them into the deliberation.

<sup>24</sup> Occasionally a court will listen explicitly to jury criticism and use it as a reason for changing its rule. Thus, in *Vascoe v. Ford*, 212 Miss. 370, 54 So. 2d 541 (1951), the Mississippi court in changing its rule as to disallowing damages for disfigurement said in part: "It is frequently said that our juries are prone to disregard the rule as heretofore established in this state and award damages for physical mutilation irrespective of the law; such an attitude is but proof of the fact that the sense of justice of the average man revolts against the rule."

<sup>25</sup> Compare *Slater v. Mexican National Ry. Co.* 194 U. S. 120, 24 S. Ct. 581 (1904) a decision by Justice Holmes holding it improper to permit an American jury to commute to a lump sum the periodic payments for support to survivors in a death action under a Mexican procedure analogous to alimony. To do so, he said, "would be to leave the whole matter a mere guess."

<sup>26</sup> One of the strengths of the experimental jury procedure is that it provides a technique for doing this.

<sup>27</sup> 31 Cal. 2d 1, 187 P. 2d 752 (1947).

<sup>28</sup> Our data suggest that the jury is not so simply hostile to contributory negligence as a defense as seems to be popularly supposed.

<sup>29</sup> But see the interesting case of *Nichols v. Nashville Housing Authority*, 187 Tenn. 683, 216 S. W. 2d 694 (1949) where in an action for the death of a child the negligence of the mother was imputed to the father so as to bar both.

<sup>30</sup> See *Hord v. National Homeopathic Hospital*, 102 F.Supp. 792 (DCDC 1952) affirming a verdict of \$17,000 for the death of a three day old child; and see, Note, 22 Univ. Chi. L. Rev. 538 (1955).

<sup>31</sup> See the excellent discussion in James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. Rev. 537 (1952) and in Note, 63 Harv. L. Rev. 330 (1948).

<sup>32</sup> Nourse, *Is Contributory Negligence of Deceased a Defense in a Wrongful Death Action?* 42 Calif. L. Rev. 310 (1954).

<sup>33</sup> *McNulty v. Southern Pacific Co.*, 96 Cal. App. 2d 841, 216 P. 2d 543 (1950).

<sup>34</sup> *Belli, The More Adequate Award*, 24 (1952).

<sup>35</sup> *Marshall v. North Branch Transfer Co.*, 166 Tenn. 96, 59 S. W. 2d 520 (1933); Green, *Blindfolding the Jury*, 33 Tex. L. Rev. 157 (1954); Gay, "Blindfolding" the Jury: Another View, 34 Tex. L. Rev. 368 (1956); Green, A. Rebuttal, 34 Tex. L. Rev. 382 (1956).

<sup>36</sup> Ehrenzweig, *Assurance Oblige*, 15 Law and Cont. Prob., 445 (1950).

<sup>37</sup> A caution is again in order. Our evidence as to how the jury actually sounds in the deliberation comes primarily from the experimental jury work and to a lesser degree from post trial interviews. We would emphasize once again that it is only an approximation of the way the jury actually talks and behaves.

<sup>38</sup> It is probable that the experimental jury tends to exaggerate the variances somewhat for two reasons. First, our experimental cases may be more ambiguous on their facts than many actual jury cases; second, our experimental juries, although drawn

from actual jury pools, have not been subjected to voir dire and include therefore relatively more jurors with extreme views.

<sup>39</sup> The project has less direct evidence on the variance of bench trial decisions, but it would appear that the model is equally correct for the individual judicial decision.

<sup>40</sup> Variance also provides the key rationale for the doctrine of *res judicata*; see Currie, *Mutuality of Collateral Estoppel*, 9 Stan. L. Rev. 281 (1957).

<sup>41</sup> This raises the amusing point that a lawyer who refuses to settle say, for \$20,000 and is hit by a \$40,000 verdict may in fact have been more right than his opponent. It may however be small comfort to him, or to his client, to realize that had the case been tried over and over to eternity the average of all verdicts would approximate \$20,000.

<sup>42</sup> See Stouffer, *Communism, Conformity and Civil Liberties* (1955); Blum and Kalven, *The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Science*, 24 Univ. Chi. L. Rev. 1 (1956).

<sup>43</sup> To balance the impressions here I should report a jury anecdote I recently heard from a lawyer. The particular jury is said to have begun its deliberation by deciding first on the lawyer's fee and then multiplying it by three to get the damages. Occasionally an appellate judge will himself be explicit about lawyers' fees when he is appraising whether a verdict is excessive or not. In *Renuert Lumber Yard, Inc. v. Levine*, 49 So. 2d 97 (Fla. 1950) where the court entered a remittitur of \$15,000 on a verdict of \$75,000, Judge Hobson dissenting said in part: "Moreover, although there is no legal basis for the inclusion of an attorney's fee in the judgment it is a matter of common knowledge that in personal injury actions lawyers do not customarily perform services for the plaintiff gratuitously. As a practical proposition it is indeed probable that after paying for the services of his attorney appellee would have little, if any, of the \$30,000 left . . . Such circumstances cannot be ignored by the writer in performing his part of this appellate court's duty to determine whether the judgment is so grossly excessive as to shock the judicial conscience."

<sup>44</sup> The survey is based on a nationwide sample of some 700 trial judges and includes some 5000 actual jury trials. Roughly 1400 of these are personal injury cases. The results will be reported out in detail in the publications of the Project.

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